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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GERALD FRANK STANLEY,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Did the trial court's creation of a clear conflict of interest among counsel actively representing petitioner Gerald Frank Stanley ("Stanley") at a competency proceeding ancillary to death penalty proceedings against Stanley, violate the constitutional right to assistance of counsel and due process of law?

II

Did the trial court's giving to the competency jury a California statutory definition of incompetency that fails to satisfy the minimum definition of incompetency announced by this Court in Dusky v. United States, 362 U.S. 402, 402 (1960), violate the constitutional right to due process of law?

LIST OF PARTIES

Parties to this petition are: (a) petitioner, Gerald Frank Stanley, an individual; and (b) respondent, People of the State of California. No party is a corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GERALD FRANK STANLEY,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PRAYER FOR RELIEF

A California trial court has imposed the sentence of death on Gerald Frank Stanley ("Stanley"). Stanley now respectfully petitions for a writ of certiorari to review, and thereafter reverse, the judgment of the California Supreme Court affirming his death sentence.

JUDGMENT

The judgment of death was entered against Stanley on February 7, 1984 in a case entitled People v. Stanley, Butte County Superior Court No. 79825. (Appendix, pp. 5-12.)

OPINION BELOW

The opinion of the California Supreme Court was filed on July 6, 1995, and is reported at People v. Stanley, 10 Cal.App.4th 764 (1995) (Appendix, pp. 13-136), as modified as of September 13, 1995 as set forth in People v. Stanley, 11 Cal.4th 219d (1995) (Appendix, pp. 137-139.)

The order of the California Supreme Court denying rehearing, and the order modifying the opinion, and the modification, were filed on September 13, 1995. The remittitur is dated September 14, 1995. Said order, modification and remittitur are found in the Appendix at pp. 137-139.

DEATH WARRANT

The death warrant of November 21, 1995 directing that Stanley be put to death on February 16, 1996 is found at Appendix pp. 140-148. On January 30, 1996, a California Supreme Court stayed execution of the Death Warrant "pending final determination of the Petition for Writ of Certiorari filed in the United States Supreme Court."

JURISDICTION

The California Supreme Court entered its judgment on July 6, 1995. That same Court modified it original opinion, and thereafter denied Stanley's petition for rehearing on September 13, 1995.

On December 1, 1995 The Honorable Sandra Day O'Connor granted petitioner's application to extend time to file this petition to on or before January 11, 1996, which was extended to March 19, 1996 to correct brief format deficiencies. (Appendix, p. 149.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

In the petition, the Sixth Amendment, to wit:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense"

and the Fourteenth Amendment, to wit:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

to the United States Constitution are at issue.

B. Statutory Provisions

Relevant provisions of the Penal Code of the State of California, i.e. Penal Code §§ 1367, 1368, 1369 are found in the Appendix at pp. 150-153.

PRESERVATION OF FEDERAL QUESTION

Stanley contends that the competency proceedings as conducted during the middle of the death penalty prosecution against Stanley violated the Sixth Amendment (assistance of counsel) and the Fourteenth Amendment (due process of law) to the United States Constitution. Those federal questions were raised and ruled on in the proceedings below.

The California Supreme Court, in its opinion in this case, reviewed and ruled on Stanley's federal question matters (Appendix at pp. 57-88) raised by Stanley, including as argued by Stanley in his opening appellate brief (Appendix at pp. 154-180) and supplemental appellate opening brief (Appendix at pp. 181-207) filed with the California Supreme Court.

STATEMENT OF THE CASE

A. Introduction

This case involves the recurring question of the minimum procedures compelled by the Sixth Amendment Assistance of Counsel clause, and due process clause of the Fourteenth Amendment of the United States Constitution, to determine whether a criminal defendant is competent to stand trial.

B. Summary Of Petitioner's Claims Of Deprivation Of Assistance Of Counsel And Due Process

On August 26, 1983, during the penalty phase of a death penalty prosecution against Stanley, the trial court, upon motion of Stanley's defense counsel, suspended the proceedings as **"the trial found a prima facie case had been established that (Stanley) was incompetent."** (Appendix at p. 60.)

A competency jury trial was then conducted, and Stanley was found competent. (Id.)

The competency trial was so flawed that Stanley suffered a violation of the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

First, the trial court created a prejudicial conflict of interest among attorneys representing Stanley at the competency trial.

Stanley's defense counsel put on evidence at the competency trial supporting a finding that Stanley was incompetent. Before that competency trial, however, the trial court appointed **"co-counsel" for Stanley** who created a serious conflict by joining at trial with the respondent to put on evidence to the competency jury that Stanley was competent.

Second, the trial court instructed the competency jury with a definition of incompetence that denied Stanley due process because the instruction failed to provide even the minimum definition of incompetency required by this Court in Dusky v. United States, 362 U.S. 402, 402 (1960).

C. Proceedings Below

1. Summary Of Criminal Proceedings

(a) **The Charges**

On October 6, 1980 in the Superior Court of the State of California, an information was filed charging petitioner with three counts, i.e. first degree murder in violation of California Penal Code § 187 (Count One); arson of an occupied dwelling in violation of California Penal Code § 451 (Count Two); and burglary of an occupied trailer coach in violation of California Penal Code § 459 (Count Three).

Three special circumstances were alleged in relation to Count One: petitioner intentionally killed the victim while lying in wait within the meaning of California Penal Code § 190.2(a)(15); he had been previously convicted of second degree murder within

the meaning of California Penal Code § 190.2(a)(2); and the victim was a witness to a crime who was intentionally killed for the purpose of preventing her testimony in a criminal proceeding within the meaning of California Penal Code § 190.2(a)(10).

It was further alleged in the commission of Count One, that petitioner personally used a firearm within the meaning of California Penal Code § 12022.5.

It was also alleged in relation to all three counts that petitioner had served a prison term and did not remain free of prison custody for five years subsequent to the conclusion of said term without commission of a felony within the meaning of California Penal Code § 667.5(b).

The information filed by the respondent sought the death penalty against Stanley.

(b) **The Guilt Trial**

Selection of a jury began on January 18, 1993. On July 22, 1983 the jury returned verdicts of guilty to all three counts and a true finding as to the special circumstances that petitioner committed the murder charged in count one while lying in wait and for the purpose of preventing the victim's testimony as a witness in a criminal proceeding. The jury further found that petitioner personally used a firearm within the meaning of California Penal Code § 12022.5 in the commission of count one.

On August 2, 1983, a combined court and jury trial was held on the special circumstance and the prior prison term enhancements. The jury returned with a finding that petitioner had suffered a prior conviction for second degree murder within the meaning of California Penal Code § 190.2(a)(2). The court found that the allegation of prior conviction was true under California Penal Code §§ 667.5(a) and (b).

(c) The Penalty Phase Trial Is Suspended Pending A Competency Trial

On August 2, 1993, the penalty phase trial commenced. Respondent rested its penalty phase case on August 10, 1983. Petitioner's case started on August 15, 1983.

During the competency trial, on Friday, August 26, 1983, Dr. David Axelrad, one of the psychiatrist treating Stanley, testified in camera about petitioner's current mental condition. At the conclusion of that testimony, the trial court concluded that Stanley's mental condition had recently deteriorated, and that Stanley's regular defense counsel (Richard Petersen and William Neill) counsel had demonstrated a prima facie case that Stanley was incompetent.

The Court then suspended the proceedings pursuant to Penal Code section 1368(b). (See code section at Appendix, pp. 150-151.)

The Court appointed medical professionals to examine Stanley. Later, Stanley rejected these doctors because Stanley believed they "are part of the

system that's trying to put him to death."

Thereafter, after replacing the suspect doctors, **the Court sua sponte brought up an offer of appointment for Stanley of co-counsel who would represent him and present evidence of competency to the compentecy jury at trial which would directly conflict with the evidence of incompetency Stanley's existing counsel was going to present to the same jury.** Stanley rejected the offer.

Later in the proceedings, the court, at the invitation of the respondent, **again** approached **directly with Stanley** the idea of appointment of additional counsel for Stanley, for the purpose arguing Stanley's competency. This second time, the Stanley agreed:

THE COURT:	Mr. Stanley, it does appear that there is a dispute at this point between you and your counsel as to proceeding under 1368. Do you wish the Court to appoint a counsel to represent you either in conjunction with these gentlemen or without these gentlemen in connection with this proceeding?
MR. STANLEY:	Yes.
THE COURT:	All right. the -- now, which way --

MR. STANLEY: With.

THE COURT: With them?

MR. STANLEY: Yes.

THE COURT: Do you want to keep them, and you want other counsel as well?

MR. STANLEY: Yes.

On August 31, 1993, the presiding Judge appointed a third defense attorney, Donald Blake, as an associate defense counsel for Stanley.

Attorney Blake was appointed "as a result of the difference of opinion between (Stanley's) present counsel and Mr. Stanley (Stanley) regarding the (Penal Code) 1368, 1369 proceeding."

On October 17, 1983, a jury trial began on the issue of Stanley's competency. Stanley was represented at the same trial by two different attorneys, who argued to the same jury, absolutely contradictory positions.

First, Attorney William Neill (Stanley's attorney who demonstrated the prima facie case of incompetence) put on evidence that Stanley was incompetent.

Attorney Neill's evidence of incompetency included testimony by Attorney William Neill (also representing Stanley in the death penalty case, along

with Neill), as well as Dr. David Axelrad.

After spending approximately 175-180 hours on the case (60 to 80 hours actually with Stanley, other time reviewing relevant medical records and speaking with counsel), Dr. Axelrad testified that Stanley had primary disorders of paranoia, intermittent explosive disorder, borderline personality disorder, with intermittent psychosis and brief reactive psychosis. Dr. Axelrad relied primarily on the disorder of paranoia and borderline personality disorder in concluding that Stanley was incompetent.

Attorney Neill testified that Stanley's direction to counsel not to introduce certain evidence, i.e. video tapes of psychiatric examination, in the penalty phase proceedings, was probative of Stanley's incompetence. Neill testified that Stanley wanted to get life, but would not allow the use of these tapes. attorney Neill testified that without the use of the tapes at the penalty phase trial, Stanley would get the death penalty. (See, Medina v. California, 505 U.S. 437, ___ [120 L.Ed.2d 353, 366 (1992) "[T]he defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.")

Second, respondent and Attorney Blake (who, along with Attorney Neill, was introduced to the jury as representing Stanley) put on evidence that Stanley was competent.

Respondent introduced evidence of Stanley's competence using testimony of two health care providers whose work consisted solely of truncated interviews with Stanley, Dr. Frederick Whipple who examined Stanley for "an hour and one quarter", and the other, Dr. Albert French who examined Stanley for "about an hour."

Neither Dr. Whipple nor Dr. French examined any of the voluminous relevant medical records concerning Stanley.

Attorney Blake's involvement in the competency phase proceedings were generally summarized by him in a presentation to the Court.

> It's stated as of record, and stated to this jury that defendant does not want to be found incompetent, does believe that he is competent, and that's the whole reason I was appointed in this case, because of a conflict between his trial counsel and his own personal wishes.

Attorney Blake, throughout the competency trial, argued, and strongly so, that Stanley was competent.

First, Blake conducted voir dire.

Second, the Court instructed the jury that Attorney Blake would put on evidence that he, as Stanley's co-counsel, felt appropriate.

Third, Attorney Blake extensively and harshly cross-examined those witnesses presented by Stanley who testified as to Stanley's incompetency, i.e., Attorney Neill and Dr. Axelrad.

Fourth, Attorney Blake also called his own witnesses in the competency trial for the purpose of providing evidence of Stanley's competency, i.e., Randall Howard Smith and Bobby Martinez.

Fifth, Blake asked questions of respondent's experts for the purpose of establishing Stanley's competency, i.e., Attorney Blake presented questions as to Dr. Whipple and Dr. French that allowed those witnesses to further speculate about Stanley's competency.

Sixth, Blake presented arguments to the jury on the competency question.

On November 16, 1983, the competency jury was instructed that "[i]n this proceeding you are to decide whether or not the defendant is mentally incompetent to be tried for a criminal offense. This proceeding is not in any sense a criminal proceeding, and the innocence or guilt of the defendant of the criminal charges against him is not involved nor is the question of his legal insanity at the time of the offense involved. [¶] Penal Code section 1367 provides that: [¶] A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this proceeding if, as a result of mental disorder or development disability, the defendant is unable to understand the nature of the criminal

proceedings or to assist counsel in the conduct of a defense in a rational manner." (Appendix at p. 61.)

The competency passe deliberations began on November 16, 1983. After start of deliberations, the jury sent the judge a note (see Appendix at p. 166) indicating that the Penal Code § 1367 instruction was unclear. (See reference to the note at the trial transcript found at Appendix pp. 164-65.)

On November 17, 1983, the competency jury returned a verdict that, under the definition of incompetency as set forth in Penal Code § 1367, Stanley was competent. (Appendix 161-163.)

(d) Conclusion Of Penalty Trial Results In Stanley Getting The Death Sentence

After the competency trial was concluded, the penalty phase trial resumed on December 5, 1983. A verdict of death was returned by the jury on December 28, 1983. Stanley was sentenced to death on February 7, 1984.

D. Rulings Of The California Supreme Court

Stanley appealed his conviction to the California Supreme Court. (There is no intermediate California appellate court that hears death penalty appeals. Pursuant to California Penal Code § 1239, subdivision (b), the appeal is automatic to the California Supreme Court.)

In that appellate proceeding, Stanley argued that the competency phase proceedings violated the Sixth Amendment and Fourteenth Amendment to the United States Constitution. (See, Appendix at pp. 154-180 and pp. 181-207.)

Stanley objected that the appointment of and subsequent advocacy by Attorney Blake violated due process and the right to counsel.

Stanley also objected that the Penal Code § 1367 definition of incompetency violated the Fourteenth Amendment to the United States Constitution as it failed to provide the correct definition of in competency.

The California Supreme Court over ruled both objections by making two holdings that are inconsistent with the United States Constitution.

First, the California Supreme Court acknowledged that the trial court had an obligation to conduct a competency proceeding once the count made a finding that there was a prima facie showing that Stanley was incompetent.

However, the California Supreme Court found no error in the appointment and subsequent advocacy by Attorney Blake as the trial court's creation of a conflict among those representing Stanley (Attorneys Neill and Petersen arguing incompetency and Attorney Blake asserting competency) gave Stanley "more than he was entitled to." (See Appendix at p. 67.)

Second, the California Supreme Court rightly concluded that the Penal Code § 1367 instruction "does not match word for word, that of Dusky." (Appendix at p. 61.)

REASONS FOR GRANTING THE WRIT

A. Introduction

The writ should be granted to remedy violations of Stanley's rights under the United States Constitution. Addressing these issues on the merits will also resolve important open questions about the procedures necessary to protect trial land conviction of an incompetent criminal defendant.

B. The Due Process Clause Compels Fair Competency Proceedings

"It is well settled that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. Drope v. Missouri, 420 U.S. 162 (1975)." (Medina v. California, 505 U.S. 437 [120 L.Ed.2d 353, 359] (1992).)

It has long been the law that "state procedures must be adequate to protect this right." (Pate v. Robinson, 383 U.S. 375, 378 (1966).)

"The failure to observe procedures adequate to protect a defendant's right not to be tried while incompetent to stand trial deprives him of his due process rights to a fair trial." (Drope v. Missouri, 420

U.S. 162, 172.)

The test establishing that the competency proceedings at issue failed to protect Stanley's due process rights is found in Medina v. California, supra, 505 U.S. 437 ___ [120 L.Ed.2d at 363]: "It goes without saying that preventing and dealing with crime is much more the business of the States that it is of the Federal Government (citation omitted), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

C. Stanley Suffered Deprivation Of Due Process

1. Appointment Of Attorney Blake, And Subsequent Advocacy By Attorney Blake Constituted A Sixth Amendment Violation Which Resulted In A Competency Trial That Violated Due Process

When Stanley's regular attorneys, i.e., Mr. Neill and Mr. Petersen, declared a doubt as to Stanley's competency to stand trial **and when the trial court, after substantial medical evidence presented by Dr.**

Axelrad, concurred and found that a prima facie case had been established demonstrating Stanley's incompetence, it was only Attorney Neill and Petersen who could argue Stanley's position, i.e. incompetency, at the subsequent competency trial.

In Pate v. Robinson, 383 U.S. 375, the State argued that a potentially incompetent defendant in a criminal proceeding "waived the defense of his incompetence ..." (Id., p. 384.) The United States Supreme Court rejected that idea holding that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. See Taylor v. United States, 282 F.2d 16, 23 (C.A. 8th Cir. 1960)." (Id.)

Likewise, when the trial court in this case declared on August 26, 1983 that a prima facie case of Stanley's incompetence had been proven, and a competency trial was necessary, it was only those attorneys prepared to advocate Stanley's incompetence (i.e. Attorneys Neill and Petersen) who could represent Stanley at the subsequent competency proceedings.

Under the Sixth Amendment to the United States Constitution as applied to the states under the due process clause of the Fourteenth Amendment, a defendant in a criminal case has a right to the assistance of counsel. (Powell v. Alabama, 287 U.S. 45, 68-71 (1932); Holloway v. Arkansas, 435 U.S. 475, 481-487 (1978).)

The right to counsel entitled a criminal defendant is not to some bare assistance, but rather to effective assistance. (Holloway v. Arkansas, supra, 435 U.S. at p. 481.)

Included in the right to effective assistance of counsel is "a correlative right to representation that is free from conflicts of interest." (Wood v. Georgia, 450 U.S. 261, 271 (1981); Cuyler v. Sullivan, 446 U.S. 335, 345-350 (1980); Holloway v. Arkansas, supra, 435 U.S. at p. 481; Glasser v. United States 315 U.S. 60, 70 (1942).)

The right to the assistance of counsel "was designed to assure fairness in the adversary criminal process ... [In other words,] the purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial, (citation omitted) ... [I]n evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. (citation omitted) Thus ... the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant ..." (Wheat v. United States, 486 U.S. 153, 163 (1988).)

Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened or compromised. (See generally ABA, Model Rules of Conduct (1983) Rule 1.7 and comment thereto.)

"Once a competency hearing is held ... the defendant is entitled to the assistance of counsel ..." (Medina v. California, supra, 505 U.S. 437 ___ [120

L.Ed.2d at 366] citing Estelle v. Smith, 451 U.S. 454, 469-471 (1981).)

The subsequent appointment of Attorney Blake to argue Stanley's competence, and Attorney Blake's advocacy of same, was a conflict that constituted a two-fold deprivation of Stanley's right to conflict-free counsel, and hence, a violation of the Sixth Amendment.

First, the appointment of Attorney Blake, and his subsequent vigorous advocacy of Stanley' competence, effectively operated as an involuntarily removal of Attorney Petersen and Attorney Neill as the sole advocates of Stanley's position. Attorney Blake's rial tactics diluted, hence effectively removed, complete representation of the position of Stanley's incompetency.

Second, as soon as Attorneys Neill and Petersen, as well as the trial court, raised their doubts as to Stanley's competence to stand trial, those attorneys effectively represented Stanley's sole position at the competence trial. The appointment of Attorney Blake as co-counsel, had the prohibited effect of injecting an undesired attorney into the proceedings thereby constituting deprivation of right to conflict-free counsel.

The right to conflict free counsel, as a component of the Sixth Amendment, is fundamental and is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. (Holloway v. Arkansas, supra, 435 U.S. at p. 489, quoting Chapman v. California, 386

U.S. 18, 23 (1967); accord Cuyler v. Sullivan, supra, at p. 349; Rose v. Clark, 478 U.S. 570, 577-578 (1986).)

Attorney Blake advocated a position, i.e, Stanley's competency, that was contrary to all law, and resulted in a violation of the Sixth Amendment to the United States Constitution.

As directed by Medina v. California, supra, 505 U.S. 437 ____ [120 L.Ed.2d at 363, due process is violated for a competency trial when the procedure given "offends some principle of justice so rooted in the traditions of our people as to be ranked as fundamental." Here, the deprivation of Stanley's Sixth Amendment rights brought about by the appointment and subsequent advocacy of Attorney Blake has resulted in competency proceedings that were completely unfair, and hence, unreliable.

2. The Jury Instruction Defining Competency Failed To Satisfy Due Process

(a) **The Instruction Was Incorrect**

Stanley's competency was tried by a jury.

At the close of evidence, the jury was instructed by the Court as to the definition of competency:

Penal Code section 1367 provides that:

> A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this proceeding if, as a result of mental disorder or developmental disability defendant is unable to understand the nature of the criminal proceedings or to assist (sic) counsel in the conduct of a defense in a rational manner.
>
> This instruction was erroneous.

The United States Supreme Court set out the legal test for competency in Dusky v. United States 362 U.S. 402, 402 (1960):

> It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.

"Because competency to stand trial is an aspect of substantive due process. . .(citations omitted). . .the legal standard by which competency is to be evaluated is constitutionally mandated." (Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir. 1992).)

"Accordingly, the component as of that standard, required as they are by the Constitution, do not vary according to the views of a particular court." (Id.)

"The Constitution can require but one gauge against which to determine whether, because of his mental condition, a defendant's due process rights are violated by requiring him to stand trial. (Id.)

Stanley submits that the definition of competency given to the jury at the close of evidence, an instruction that closely tracks the wording of Penal Code section 1367, fails to satisfy the competency definition mandated by Dusky v. United States, supra, 362 U.S. 402.

A few examples of the deficiencies are useful:

First, there is nothing in the instruction that required Stanley to be able to understand the nature and purpose of the criminal proceedings against him.

All the instruction states is that Stanley be "unable to understand the nature of the criminal proceeding."

Second, the instruction was completely silent on the requirement that Stanley "comprehends his own status and condition in reference to such proceeding" as required by Dusky.

Third, the instruction given was deficient in its inclusion of the word **rational** in conjunction with the word manner, i.e., **rational manner**.

The appropriate Dusky standard requires "a present ability to consult with his lawyers with a reasonable degree of rational understanding - and whether he has a rational, as well as factual understanding of the proceedings against him." (Emphasis added.) (Dusky v. United States, supra, 362 U.S. 402, 402.)

The problem with the Penal Code section 1367 instruction is that the phrase therein "rational manner" is ambiguous and fails to provide the full two-fold rational test set out in Dusky, i.e., "sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding - and whether he has a rational, as well as factual understanding of the proceeding against him.

"Describing the degree of understanding that a defendant must have, the court in Dusky said that it is not enough that the defendant be oriented in time and place." (Silten & Tullis, Mental Competency I Criminal Proceedings (1977) 28 Hastings Law Journal 1053, 1060.) "Rather, the defendant must have a rational as well as factual understanding of the proceedings against him." (Id.) See also, Haddox, et al. Mental Competency to Stand Trial While Under the Influence of Drugs (1974) Loyola Law Review, pp. 428-437 (careful review of the Dusky case, including transcript from trial court proceedings, revels that Supreme Court holding mandates a three-part competency analysis).)

The complete and full Dusky definition of competence to stand trial was missing from the relevant jury instruction in this case. These critical

omissions constitute a deprivation to Stanley of the due process of law. (See, Lafferty v. Cook, supra, 949 F.2d 1546, 1550.)

(b) The Error Requires Reversal

Reversal is required under both the "structural defect" and "harmless error" test.

First, reversal is required under the "structural defect" test.

Any error in giving a jury instruction, when the error is of federal constitutional dimension and amounts to a structural defect is reversible per se. (Sullivan v. Louisiana (1993) 508 U.S. ___, 124 L.Ed.2d 182, 199.)

The trial judge suspended the penalty proceedings in this case pursuant to Penal Code section 1368, and referred the matter to the presiding judge for a Penal Code section 1368 competency proceeding.

Stanley submits that the defective jury instruction defining competency to stand trial given in this case creates a structural defect that mandates per se reversal.

Second, reversal is required under the "harmless error" test.

There are instance when deprivation of a constitutional right during trial does not render the trial

verdict per se reversible.

"In those instances, the verdict is not disturbed if the constitutional error was "harmless." (Chapman v. California, 368 U.S. 18 (1967).

Stanley submits that even under Chapman, the erroneous instruction in this case could not be considered harmless error.

In Chapman, the Supreme Court found that area is harmless if, beyond a reasonable doubt, it "did not contribute to the verdict obtained." (Chapman v. California, supra, 386 U.S. 18, 24.) "To say that an error did not contribute to the verdict . . . is to find that error unimportant in relation to everything else the jury considered on the issue in question. . ." (Yates v. Evatt, 500 U.S. ___, ___, [114 L.Ed.2d 432, 448-449] (1991).

The Chapman harmless error test is clearly not satisfied in this case.

First, respondent puts heavy emphasis on the Penal Code section 1367 definition of incompetency during Respondent's closing argument:

> So when you look at the standard -- I mean -- of the law, that was given that a person cannot be tried or adjudged to punishment while such person is mentally incompetent, a defendant is mentally incompetent, for the purpose of this proceeding, as a result of mental disorder or developmental disability, the

> defendant is unable to understand the nature of the civil proceedings or to assist in the conduct of a defense in a rational manner.

Indeed, the prosection positioned its entire closing argument on the Penal Code section 1367 definition, a definition that clearly does not present the full Dusky standard.

Second, the instruction itself is clearly wrong.

Third, the ambiguities in the instruction caused the jury to be confused.

After the jury retired to deliberate, the judge announced that, "We had an inquiry from the jury." "The jury wants the definition of **rationally assist** and I think a copy of the note was given to all counsel."

Indeed, the jury sent a note to the judge stating, "The jury wants a definition of rationally assist."

It is clear that the instruction, as might be suspected, caused the jury substantial confusion.

Fourth, the issue of competency was hotly contested during trial. In this regard, Stanley has an expert, and those attorneys who represented Stanley's actual interests, i.e., Attorney Petersen and Attorney Neill, never conceded that Stanley was competent. This position was supported by the elaborate testimony of Dr. Axelrad.

At a minimum, since the definition of competency is a Federal Constitution dimension, the judgment must be reversed unless the respondent can demonstrate (which it can't) beyond a reasonable doubt that the error did not affect the verdict. (See, Rose v. Clark, supra, 478 U.S. 570 at 576-582.)

Based on the above, the respondent is unable to satisfy the harmless error analysis. Accordingly, should the Court elect to apply the harmless error standard, it is clear that, under the appropriate test, the error can not be classified as harmless.

D. This Court Will Address Important Issues In Correcting The Errors Of The California Supreme Court

In deciding Stanley's Sixth Amendment and Fourteenth Amendment claims, the California Supreme Court was just plain wrong.

First, in appointing Attorney Blake, and then permitting Attorney Blake to argue adverse to Attorneys Neill and Petersen, Stanley was not given "more than he was entitled to."

There is no precedent for, nor does common sense support, the proposition relied on by the California Supreme Court that a same potentially incompetent defendant benefits by having attorneys with diametrically opposed competency positions be permitted to present evidence and argument to the same competency jury.

Second, there is no precedent for, nor does common sense support, the proposition relied on the California Supreme Court that a jury ought to be able to infer or imply the definition of incompetency from a deficient instruction. The reliance by the California Supreme Court is especially absurd given the fact that the jury in this case sent a note explaining that it was confused by an instruction the California Supreme Court conceded does not match the Dusky constitutionally mandated test of competency "word for word."

This case follows Medina v. California, supra, 505 U.S. 437, and is another important matter concerning the constitutionally mandated parameters of competency proceedings.

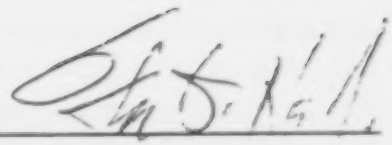
CONCLUSION

In Medina v. California, supra, 505 U.S. 437, ___ [120 L.Ed.2d at 367] this Court ruled that when determining whether due process parameters of competency proceedings have been satisfied, "it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted [,] a reasonable opportunity to demonstrate that he is not competent to stand trial."

Stanley was clearly deprived of that opportunity.

The petition for a writ of certiorari should be granted.

Dated: March 17, 1996.

By 

Frank E. Hagie, Jr.
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JON-MARC DOBRIN
A Professional Corporation
685 Market Street, Ste. 360
San Francisco, CA 94105

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GERALD FRANK STANLEY,

Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S APPENDIX FOR A WRIT OF CERTIORARI

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF BUTTE

FILED FEBRUARY 7, 1984
NO. 79825

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

GERALD FRANK STANLEY,
Defendant

COMMITTMENT: JUDGMENT OF DEATH

TO: The Sheriff of Butte County, And to The Warden of the State Prison of the State of California at San Quentin.

BE IT REMEMBERED that on the 6th day of October 1980 an Information was duly filed by the District Attorney of Lake County in the Superior Court of California, County of Lake (#CR-1323) against the defendant Gerald Frank Stanley, also known as Jerry Frank Stanley, hereinafter referred to as "defendant," charging said defendant as follows:

COUNT I. First degree murder of Cynthia Rogers Stanley, a violation of section 187 of the Penal Code, and that the defendant personally used a firearm, to wit, a rifle, within the meaning of section 12022.5 of the Penal Code. The following special circumstances were charged and alleged: (a) that the defendant intentionally killed Cynthia Rogers

Stanley while lying in wait, within the meaning of section 190.2(a)(15) of the Penal Code; (b) that Cynthia Rogers Stanley was a witness to a crime who was intentionally killed by defendant for the purpose preventing her testimony in a criminal proceeding, but that said killing was not committed during the commission and attempted commission of the crime to which she was a witness, within the meaning of section 190.2(a)(10) of the Penal Code; and (c) that defendant was previously convicted of second degree murder on or about the 30th day of April 1975, in the Superior Court of the State of California, in and for the County of Contra Costa, in violation of section 187 of the Penal Code, within the meaning of section 1990.2(a)(2) of the Penal Code.

COUNT II. Arson, a violation of section 451 of the Penal Code.

COUNT III. Second degree burglary, a violation of section 459 of the Penal Code.

It was further separately charged that prior to the commission of the offenses charged in Counts I, II, and III, said defendant had served a separate term in state prison of one year and more for murder, a violation of section 187 of the Penal Code, upon his conviction in 1975 in the Superior Court of Contra Costa County, State of California, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of said term, within the meaning of section 667.(5)(a) of the Penal Code as to Count I

and a period of five years subsequent to the conclusion of said term, within the meaning of section 667.5(b) as to Counts II and III, respectively.

It was further separately charged and alleged that defendant committed the offenses charged in Counts I, II, and III while he was on state prison parole pursuant to section 3000 of the Penal Code, following a term of imprisonment imposed for having committed a violent felony, to wit, murder in violation of section 187 of the Penal Code, within the meaning of section 1203.08(a) of the Penal Code.

Thereafter the defendant was duly arraigned and entered a plea of not guilty to the charges set forth in the Information, denied the use of a firearm, denied the three special circumstances therein alleged as to Count I, and denied the remaining allegations of the Information. The defendant entered a further plea of not guilty by reason of insanity. However, on October 12, 1982 the defendant and his attorneys withdrew the plea of not guilty by reason of insanity. On December 7, 1982 the court granted defendant's motion for change of venue, and on December 17, 1982 this action was transferred to the above-entitled court.

Thereafter, with the defendant and his attorneys being present, the matter proceeded to a trial by jury on January 18, 1983 on all issues except as to the issues raised by the allegations pertaining to sections 667.5(a), 667.5(b), and 1203.08(a), which issues were tried by the court upon defendant's waiver of a jury trial thereon. On July 22, 1983 the

jury returned verdicts finding the defendant guilty of all counts of the Information, that the murder in Count I was of the first degree, that defendant did use a firearm, to wit, a rifle during the commission of the crime charged in Count I, and that the special circumstances alleged in Count I under sections 190.2(a)(10) and 190.2(b)(15) of the Penal Code were true.

The jury trial on the special circumstance alleging prior conviction of murder was then set to commence on August 1, 1983. However, on July 29, 1983 the defendant filed a Petition for Writ of Habeas Corpus attacking his 1975 murder conviction in Contra Costa County, California. Thereupon, this Petition was heard by this court on August 1, 1983. The petition was summarily denied because it failed to reveal sufficient facts to establish even a prima facie case for relief and it was totally lacking in, and devoid of, merit.

Thereupon, the matter proceeded to trial by the same jury on the alleged special circumstance of prior conviction of murder under section 190.2(a)(2) of the Penal Code. On August 2, 1983 the jury returned its verdict finding that this special circumstance was true. Likewise, the court found true the allegations pertaining to sections 667.5(a), 667.5(b), and 1203.8(a) of the Penal Code.

Thereafter, the matter proceeded to a penalty phase of the trial, a prescribed by section 190.1 of the Penal Code, before the same jury. (During the penalty phase the trial was suspended on motion of defendant's attorneys and proceedings instituted

under section 1368 et seq. of the Penal Code. These latter proceedings were tried by a separate jury which returned a verdict, on November 17, 1983, that the defendant was competent within the meaning of section 1367 and 1368 of the Penal Code, whereupon the penalty phase trial reconvened with the original jury.) On December 28, 1983 the jury rendered the following verdict:

> "The People of the State of California, plaintiff, vs. Gerald Frank Stanley, aka Jerry Frank Stanley, defendant, No. 79825. We, the jury in the above entitled cause, find that the aggravating circumstances outweigh the mitigating circumstances and determine the punishment to be Death."

Thereupon, the matter was referred to the Probation Department for a report, and the sentencing hearing was set for January 24, 1984, at which time the matter was continued to February 7, 1984 at the request of defendant personally and his counsel and upon their waiver of all time requirements in this respect.

Thereafter, on February 7, 1984, the defendant's motion for a new trial under section 1181(5) of the Penal Code was heard and denied. On the same date the defendant's automatic motion, under section 190.4(e) of the Penal Code, for modification of the death penalty verdict was heard and denied. The court reviewed the evidence and considered, took into account, and was guided by the aggravating and mitigating circumstances

referred to in section 190.3 of the Penal Code. Thereupon, the court made its independent determination that the weight of the evidence supported the jury's findings and verdicts, and that said findings and verdicts are not contrary to law or the evidence presented. The court set forth the reasons for its rulings on the record and directed that they be entered on the Clerk's minutes.

There having been found no legal cause why judgment should not be pronounced against defendant, the court, on February 7, 1984, pronounced judgment and sentence on Counts I, II, and III, respectively, with the sentences on Counts II and III to run concurrently with the sentence on Count I.

NOW, THEREFORE, IT IS THE JUDGMENT AND SENTENCE of this court that for the offenses of the murder of Cynthia Rogers Stanley, as charged in Count I of the Information, of which the defendant Gerald Frank Stanley has been found guilty by the verdict of the jury, the jury having found the offense of murder to be First Degree, and the jury having found the alleged special circumstances to be true, and the same jury having determined that the penalty for such crime shall be death, and the court having denied the automatic motion for the modification of such death penalty verdict, IT IS THE ORDER OF THIS COURT THAT DEFENDANT GERALD FRANK STANLEY, also known as JEWRY FRANK STANLEY, SHALL SUFFER THE PENALTY OF DEATH. This penalty is to be inflicted within the walls of the State Prison at San Quentin, California, in the manner and by the means prescribed by law

at the time to be fixed by this court pursuant to Order of Execution.

The defendant herein is hereby remanded to the care, custody and control of the Sheriff of Butte County to be delivered by him within ten (10) days from the date of the judgment herein, in the usual course of his duties, to the Warden of the State Prison at San Quentin, California, for the execution of the death penalty, to be held pending the decision upon defendant's automatic appeal.

Therefore, this is to command you, the Sheriff of Butte County, to take said defendant Gerald Frank Stanley to the State Prison of the State of California at San Quentin, California and, within ten (10) days from the date of the judgment herein, to deliver him into the custody of the Warden of said State Prison; and

Further, this is to command you, the Warden of the State Prison of the State of California, at San Quentin, California, to hold said defendant Gerald Frank Stanley in your custody pending the decision of this cause on appeal and, upon the judgment herein becoming final, to carry into effect the judgment of said court, at a time and on a date to be hereafter fixed by Order of this Court, within the State Prison, at which time and place you shall then and there put to death the said defendant Gerald Frank Stanley, also known as Jerry Frank Stanley, in the manner and by the means prescribed by law.

In Witness Whereof, I have hereunto set my hand as Judge of the Superior Court (assigned) and

have caused the seal of said court to be affixed hereto.

Done in Open Court this 7th day of February, 1984.

/signed/
JEAN MORONY
Judge of the Superior Court
(Assigned)

SUPREME COURT OF THE STATE OF CALIFORNIA

FILED JULY 6, 1995
NO. S004605

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff And Respondent,

vs.

GERALD FRANK STANLEY,
Defendant And Appellant

OPINION

WERDEGAR, J. A jury convicted Gerald Frank Stanley of the first degree murder of Cindy Rogers Stanley (Pen. Code, §§ 187, 189)[1] (count I), arson of an inhabited dwelling (§ 451) (count II) and burglary of an inhabited trailer coach (§ 459) (count III). The jury also found that defendant personally used a firearm in the commission of the murder. (§ 12022.5.) The jury found true the special circumstance allegations that defendant committed the murder while lying in wait (§ 190.2, subd. (a)(15)) and for the purpose of preventing the victim's testimony as a witness in a criminal proceeding (§ 190.2, subd. (a)(10)). In a separate proceeding the jury also found true the special circumstance allegation that defendant had previously convicted of second degree murder. (§

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

190.2, subd. (a)(2).) Pursuant to > parties' waiver of jury trial, the court found true the allegation that >Odant had served a prior prison term and had not remained free of prison custody for five years without commission of another felony offense resulting in a conviction. (§667.5, subd. (b).) Following a competency trial (§ 1369) at which the jury found defendant mentally competent, the jury returned a verdict of death; the court entered judgment accordingly. This appeal is automatic. (§ 1239, subd. (b).)

We affirm the judgment.

I. FACTS

A. Guilt Phase

Defendant met the victim, Cindy Rogers, on luly 3, 1980, at the fairgrounds in Hayfork, Trinity County. He was introduced to Cindy by Gary Wells, a friend of defendant's brother John. Defendant was a professional hunting guide. At the time, he was on parole and trying to gain custody of his two children by his second wife, whom he had murdered in 1975.[2] On July 7, 1980, he and Cindy were married in Reno. On their return to Califomia the next day, the pair went to Lake County where Cindy's parents, It the Spatigs, owned and operated the Spatig motel-resort in Nice, near Clear Lake.

On July 16 defendant allegedly committed three felony offenses against Cindy, the nature of which were kept from the jury.[3] On July 18 defendant burned down Cindy's house in Lucerne, Lake County. On July 20 he burned her car.

On July 20 Cindy filed felony charges against defendant for the July 16 offenses; based on the charges, a parole violation warrant issued for

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[2]During the guilt phase of trial, the jury knew only that defendant was on parole and seeking custody of his two children. Not until a scparate trial on thc prior-murder-conviction special circurnstance did they learn that the crime for which defendant had been imprisoned was the second degree murder of his previous wife.

[3]Defendant allegedly beat and raped Cindy and forced her to orally copulate him.

defendant's arrest.

From July 20 to August 11, the day of her death, Cindy stayed away from defendant. On July 20 she and her entire family spent the night in a motel in Ukiah. Thereafter Cindy stayed variously with a longtime friend and co-worker, Stan Simpson, a new friend, Patrick Pounden, and her parents at their resort. On the evening of August 11, 1980, defendant, armed with a high-powered scope rifle, positioned himself behind a tree across the road from the Spatig resort. Just before 10 p.m., Cindy, her father Frank Spatig, and Simpson moved their lawn chairs from a patio area where they had been seated to a more open location near the resort swimming pool facing Highway 20. Cindy's son was playing in the pool. Shortly after the three seated themselves by the pool, Frank Spatig got up and turned on the pool area lights. As Spatig sat down again, defendant shot Cindy through the heart; she died almost instantly. Defendant then fled.

On August 12, defendant burglarized a mobilehome. On August 13 he was arrested at the house he shared with his mother in Anderson, Shasta County.

The evidence against defendant was circumstantial. Briefly stated, the prosecution evidence showed defendant was concerned he would not obtain custody of his children if Cindy pressed the criminal charges against him.

Sometime in the latter part of July, defendant's mother, Mrs. Stanley, called Cindy's mother, Bobbie

Spatig, to ask her to convince Cindy to drop the charges against defendant. On July 20 defendant made an anonymous telephone call to Sergeant Adkins of the Shasta County Sheriff's office in which he reported he had met Gary Wells at the Harbor Bar in Clear Lake a few days earlier, they had been drinking heavily, and Wells had told him he was going to kill Jerry Stanley and Cindy Stanley, because Cindy had been his girlfriend and Jerry Stanley had married her after knowing her only a few days. On August 4 defendant's mother, Mrs. Stanley, rented a silver-gray Camaro for defendant at his request, because the other vehicles to which he had access were known to law enforcement and he was unwilling to turn himself in on the parole violation at that time. On the day of the shooting defendant was seen at the Island Park Cafe in Lake County and, about 4 p.m. the same day, in nearby Williams in Colusa County.

After the shooting, witnesses near the site from which the shot was fired saw a man running past their home, carrying a gun and wearing what appeared to be a jacket. He disappeared into the darkness. Shortly after, they saw a car start to move, its lights and engine off. After the headlights were turned on and the engine started, the car turned left onto Highway 20 east toward Lucerne and the Harbor Bar. The murder weapon, a Browning rifle with a Redfield scope, subsequently was found about 18 to 20 feet out in the lake off the Harbor Bar. The rifle had been purchased by Edna Stanley.

About 10:50 or 10:55 p.m., a car traveling east on Highway 20 approached a police roadblock. The

car pulled to the side of the road for a second or two and then made a Upturn and proceeded westbound in the direction from which it had come. Police officers gave chase. They noticed cloud of dust floating across the highway from a private driveway, licating someone had turned up the driveway at a high speed. Following trail, the officers found the Camaro abandoned behind a residence where it had come to a skidding stop due to a log blocking the driveway.

During the early morning hours of August 12, defendant broke into a obilehome on the Spartan Ranch, nine to ten miles from where the Camaro was abandoned. Later that day he walked to Highway 20, where he hitched a ride with the Pauls, a couple returning from a camping trip in Fort Bragg. The Pauls dropped defendant off in Anderson. The next day, after the Stanley house was surrounded by police, defendant surrendered.

A search of the Camaro yielded, among other things, a loaded rifle, an empty rifle case, binoculars out of their case, a corduroy jacket, a knit cap, a ski mask, and a spiral notebook containing a letter in defendant's handwriting to his parole agent, John Ransom. Defendant's fingerprints were found on the car trunk and the notebook. The dome light, intact and working when the car was rented, had been removed from the ceiling of the car, thus preventing a light from going on when the car door was opened. An excerpt s from the letter to Ransom read in part as follows: "John, when you read this I will be dead! Better this way as my life and everything I fought for has been destroyed. My

fight for my kids I can never win now."

A search of defendant's room in the Stanley residence in Anderson yielded Winchester 30.06 150-grain ammunition consistent with the spent cattridge in the chamber of the Browning rifle and with the lead taken from to Cindy's body, as well as a photograph of defendant holding the Browning rifle. A spent 30.06 cartridge was found in the living room. The evidence also showed that the Browning had been carried in the empty rifle case found in the Camaro.

While in custody, defendant, at his request, spoke with Sergeant Coulter. Defendant told Coulter that the evening of the murder he was with two people named Gary and Linda, who were involved in drug deals in Lake County. He went with them to the Harbor Bar, where he waited in the car while they made some phone calls. He then drove them east on Highway 20. When they approached the roadblock, Gary told defendant to turn around. As they got to the dirt driveway, Gary told him to stop, whereupon Gary and Linda jumped out into the brush while defendant continued up the driveway. At trial defendant admitted the entire story was a lie.

Defendant testified in his own defense. He denied killing Cindy. He stated he was on the telephone talking to his mother at the time of the murder. Mrs. Stanley corroborated his testimony. Defendant's theory was that Cindy had been killed either by his brother, John Stanley, or by Gary Wells or Mike Saylor, but most likely by Wells. Wells had

introduced Cindy to defendant and allegedly was jealous that Cindy had married him. Wells also supposedly was concerned about a conversation overheard by Cindy that implicated John Stanley, Saylor and himself in a robbery they had committed. Neither Wells nor Saylor had a verifiable alibi for the evening of the murder.

B. Penalty Phase

In the penalty phase the prosecution presented evidence of the circumstances surrounding defendant's 1975 murder of his second wife, Kathleen (Kathy) Rhiley Stanley. The prosecution also presented evidence of uncharged offenses committed by defendant involving violence or threats of violence. Finally, the prosecution presented evidence that, one day before he killed his wife Cindy, defendant murdered Cheryl Renee Wright. In mitigation, defendant presented, inter alia, testimony of his mother and other family members and certain mental evidence.

1. Conviction for 1975 Murder of Kathy Stanley

Jackie Foster, an eyewitness to Kathy Stanley's murder, testified that on January 14, 1975, she saw defendant waiting near the office at his daughter Kristie's school. As Kathy Stanley drove up the school driveway to let Kristie out, defendant jumped into the car on the passenger side. Foster heard Kathy and defendant's two children scream and saw Kathy try to get out of the car. With the two children between them, defendant grabbed Kathy

underneath the neck and twice shot her. Kathy fell out of the car, and defendant ran away with Kristie while his son J.J. tried to follow them.

Defendant's first wife, Linda Faith, testified he called her the day after Kathy's murder. He told her he was going to pretend he was mentally ill, knew how to get away with that with the psychiatrist, and would be out in two or three years. He also threatened to "take care of her" like he did Kathy.

Kathy's mother, Crystal Rhiley, testified Kathy and defendant had separated in October 1974 after seven and a half years of marriage. At that time Kathy moved to Oakland for a few weeks, then stayed with a friend in a trailer park in Vacaville, and finally moved to her mother's house. In October 1974 defendant came to Crystal Rhiley's house looking for Kathy, and threatened to put Kathy in a condition in which her mother would not recognize her unless Kathy returned a pickup truck to him.

The transcript of defendant's testimony at his prior murder trial was read to the jury. Defendant in that case testified as to his efforts to locate Kathy and their children. Kathy wrote to him, indicating a possibility of getting back together. He testified if Kathy told him there was no chance of their reconciling, he planned to kill himself in front of her. On the morning of the killing he drank a tall can of beer and took three or four codeine pills. He went to his daughter's school with a loaded gun in his p ocket. He remembered getting in the car and kathy screaming, but did not remeber shooting her. The next thing he recalled was being down the driveway

with his daughter and hearing his son calling to him.

2. Murder of Cheryl Renee Wright

The prosecution presented evidence showing defendant murdered Cheryl Renee Wright on August 10, 1980. Beverly Johnston, Wright's mother, testified she spoke with Wright at 6:30 p.m. that day. Wright was then at her sister Rhonda's house in Sacramento. Rhonda testified Wright left to return to her apartment in Redding around 7:15 or 7:30 p.m., dressed in a wine colored strapless jumpsuit in a flowered pattern. She had no more than $50 with her. Johnston attempted to reach Wright in Redding at 10 p.m. Wright's boyfriend, Randy Orum, was waiting there for her. Wright had called him at the apartment around 8 p.m. and again within the hour. Johnston called Wright's apartment again around midnight and still later, at 2 a.m., and then called the highway patrol.

Around 9 p.m. two employees of a service station in Williams saw defendant drive into the station in a light-colored Camaro. He was with a girl identified as Wright. She made several phone calls and changed her clothes. Defendant discussed with the service station employees how to fix the tire on her Vega. Defendant had previously been seen at the station driving a brown and tan pickup truck with an Oakland Raiders sticker. Defendant and Xb Wright discussed towing her car. He claimed he had a friend about six miles out in the counts who had a Vega, and that he could get two tires and wheels so she could get her car fixed. The tow senice operator had been in the area for 22 years and knew almost

even one; according to him, no one in the area owned a Vega. When defendant left the station, he drove toward the northbound I-5 ramp, which also led to Highway 20.

Wright's Vega, with a badly damaged rear tire and low left tire, was found north of Williams at 2:40 a.m. on August 11, 1980.

On August 17, 1980, Wright's body was found buried under gravel at an abandoned oil well on Bear Valley Road off Highway 20. She had died as a result of a head wound inflicted by a .25-caliber bullet fired from a semiautomatic pistol. Death had occurred between two days and two weeks earlier; the exact time of death could not be determined due to deterioration of thel body.

Police collected samples of the gravel that covered the body and of the gravel that covered the floorboards on the driver's side of the Camaro defendant was driving on August 10. John Rapp, a geologist for the California Division of Mines and Geology and a specialist in rock identification, examined the samples and concluded the gravel from the well site and the gravel from the Camaro were virtually identical. He testified that kind of gravel was not indigenous to Colusa County, being native only to Southern California. The gravel at the well site and in defendant's car matched a kind of gravel dug in Bakersfield and delivered to the mine by Coastal Engineering Company of Bakersfield in May 1979. Coastal Engineering Company had never delivered gravel from that source anywhere else north of Sacramento.

During the search of Mrs. Stanley's house police found .25-caliber ammunition in the bedroom defendant had used, as well as in the garage and master bedroom.C

3. Other Uncharged Offenses Involving Violence or Threat of Violence

During the guilt phase the prosecution introduced evidence that on or about July 20, 1980, defendant committed arson of Cindy's automobile. Defendant was not charged with arson, but during the penalty phase the prosecutor argued it as a circumstance in aggravation, and the jury was instructed on the elements of arson.

P., Kathy's sister, testified defendant raped P. at gunpoint in the house he shared with Kathy in spring 1974. He then watched P. while she bathed and told P. he would kill Kathy if she told anyone what he had done. Later, defendant attempted to rape P. in her car. She managed to escape, naked from the waist down. P. also testified regarding an earlier occasion when defendant had vandalized her family's car.

James Rhiley, Kathy's father, testified that in the summer of 1969, after he ordered defendant off his property, defendant threatened him with violence.

Linda Faith testified that in October or November of 1965 defendant fired a shotgun at a neighbor's door in response to the neighbor's refusal to turn down his stereo.

Barbara Gwiazdon testified defendant called her in October 1969 and threatened bodily injury to her family if they evicted his parents from their rental house. He warned her not to leave her house alone or to leave her cars out.

Claudia Ameral testified that in the summer of 1970 she heard defendant threaten to kill his sister-in-law. At that time Ms. Ameral and her husband owed defendant money. Defendant made a series of telephone calls threatening them with physical violence, death and destruction of their house, unless they paid the debt.

Everett Downing, a neighbor of defendant, testified that in the fall of 1971 defendant asked him to come to his house to discuss some rubbish on defendant's lawn. When Downing knocked at the door, defendant emerged, pulled off his shirt, and wanted to fight. He also threatened to burn Downing's camper.

4. Mitigating Evidence

Defendant's mother testified about defendant's childhood, including the surgeries performed on his deformed lip and nose and his commitment to the California Youth Authority. She also testified about his love for his children and her love for him.

Judy Alleman, defendant's sister, Phillip Alleman, defendant's brother-in law, and Todd, Kristie and J.J., defendant's children, testified they loved defendant and he loved them. It was stipulated that, if called to testify, Bobby Martinez,

defendant's cellmate for 10 months in the Lake County jail, and Tom Landrum, defendant's cellmate for several months, would testify defendant was a pleasant companion and they considered him a friend.

It was further stipulated that testimony given at defendant's 1975 trial by three psychiatrists and by four Stanley family members could be read to the jury. Pursuant to the stipulation, the testimony of Dr. Leoti Thompson, a psychiatrist who had interviewed defendant on four occasions, both before and after Kathy Stanley's murder, was read to the jury. Dr. Thompson opined defendant might have been unable to premeditate or deliberate due to his mental state at the time of the murder. Dr. Thompson diagnosed defendant as a passive dependent individual suffering an anxiety reaction with considerable underlying anger and depression.

The testimony of Dr. Martin Blinder was also read to the jury. Dr. Blinder testified to defendant's dependency on his family. His longing for his family after he and Kathy separated probably caused internalized anger that deepened his depression and made him suicidal. Dr. Blinder did not believe that on the morning of the crime defendant had the power to reason in a normal fashion, although he acknowledged it was possible defendant had consciously intended to kill Kathy.

Forensic psychiatrist Dr. Charles Morris testified he was retained by the district attorney to examine defendant only hours after the 1975 murder. He deliberately interviewed defendant without knowing

any details of the offense. He concluded defendant was sane, with no aberTations in his ability to formulate plans and to put them in action. Dr. Morris diagnosed defendant as having a dyssocial reaction and moderate reactive depression. In his opinion defendant was lying when he said he had no memory of the actual shooting.

The testimony of defendant's sister, brother-in-law, mother, and older son was read into the record. All described the extent of defendant's beer drinking; his mother additionally testified to his use of prescription drugs (codeine, Percodan, and Valium).

Captain Wood, Butte County jail commander, testified he had contact with defendant on a regular basis and considered him a model prisoner. On cross-examination he acknowledged defendant was housed not with the general population, but in a single cell with a separate recreation area.

The last defense witness was Dr. David Axelrad, a psychiatrist. Dr. Axelrad interviewed defendant and his family; read police, defense, and prosecution investigation reports, prison records, prior psychiatric reports, and medical records; and reviewed the transcript of the 1975 murder trial. Dr. Axelrad's testimony was illustrated by twelve and one-half hours of videotaped interviews he conducted with defendant. During the course of the interviews Dr. Axelrad injected defendant with sodium amytal, a substance that enhances a subject's willingness to talk (although not affecting the truthfulness of what he says). Dr. Axelrad

believed if defendant had been able to provide any further information about Cindy's death, he would have done so under the influence of sodium amytal; as he did not, Dr. Axelrad concluded defendant was not feigning mental illness. In Dr. Axelrad's opinion, at the time of the capital crime defendant was suffering from five mental disorders that caused him not to appreciate the criminality of his act: paranoid disorder, intermittent explosive disorder, borderline personality disorder, alcohol intoxication, and abuse of barbiturates and sedatives. Neurological tests revealed no signs of organic brain damage.

II. DISCUSSION

A. Guilt Phase

1. Suppression Issues

Before trial defendant filed a motion to suppress evidence seized from the Camero and the Stanley residence in Anderson, and from interception of his letters and conversations in the Shasta County jail, among other items. After lengthy hearing filling 3,500 pages of transcribed oral proceedings, the trial court granted the motion in part and denied it in part. Defendant and the prosecution both petitioned for writs of mandate. (§ 1538.5, subds. (i), (o).) The Court of Appeal consolidated the proceedings for hearing and disposition. On August 14, 1981, the court, in an unpublished opinion, granted in put and denied in part each petition. (Nos. 53398 and 53463.) On July 22, 1982, this court denied defendant's petition for hearing.

a. *Law of the Case*

On appeal defendant raises the same search issues he raised unsuccess fully in his pretrial petition for writ of mandate in the Court of Appeal. The issue before us is whether, as the Attorney General contends, further review of the search issues is foreclosed by the doctrine of law of the case.

As reiterated in *People v. Shuey* (1975) 13 Cal.3d 835, 841 [120 Cal.Rptr. 83,533 P.2d 211] *(Shuey):* " 'The doctrine of the law of the case is this: That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular.' " (1) The principle applies to criminal as well as civil matters *'(ibid.;* see also *People v. Medina* (1972) 6 Cal.3d 484, 492 [99 Cal.Rptr. 630, 492 P.2d 686]), and it applies to this court even though the previous appeal was before a Court of Appeal *(Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434 [212 Cal.Rptr. 466, 696 P.2d 1308] *(Searle)).*

The principal reason for the doctrine is judicial economy. "Finality is attributed to an initial appellate ruling so as to avoid the further reversal and its

proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding." *(Searle, supra,* 38 Cal.3d at p. 435.) Because the rule is merely one of procedure and does not go to the jurisdiction of the court *(People v. Medina, supra,* 6 Cal.3d at p. 492; see *Clemcnte v. State of California* (1985) 40 Cal.3d 202, 212 [219 Cal.Rptr. 445, 707 P.2d 818]), the doctnne will not be adhered to where its application will result in an unjust decision, e.g., where there has been a "manifest misapplication of existing principles resulting in substantial injustice" *(Shuey, supra,* 13 Cal.3d at p. 846), or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations *(People v. Ramos* (1984) 37 Cal.3d 136, 146 [207 Cal.Rptr. 800, 689 P.2d 430] *(Ramos)).* The unjust decision exception does not apply when there is a mere disagreement with the prior appellate deterrnination. *(Shuey, supra,* 13 Cal.3d at p. 846.).

Defendant argues that this court's constitutional duty to review all judgments of death to ensure there has not been a miscarriage of justice (Cal. Const., art. VI, § 11; see § 1239, subd. (b)) precludes application of the law-of-the-case doctrine to decisions of intermediate appellate courts. *(People v. Stanworth* (1969) 71 Cal.2d 820, 832-833 [80 Cal.Rptr. 49, 457 P.2d 889] [holding a defendant in a death penalty case cannot waive automatic appeal prescribed by § 1239, subd. (b)].) We have previously resolved this question adversely to defendant's position. *(People v. Keenan* (1988) 46 Cal.3d 478, 505-507 [250 Cal.Rptr. 550, 758 P.2d

1081]; *People v. Ghent* (1987) 43 Cal.3d 739, 758-760 [239 Cal.Rptr. 82, 739 P.2d 1250].) *People v. Stanworth, supra,* 71 Cal.2d 820, on which defendant relies, is distinguishable in that our focus there was on a death penalty defendant's automatic right of review, not on which appellate court should provide the review. (See *Stanworth, supra,* 71 Cal.2d at pp. 832-834.) Indeed, we have applied the doctrine of law of the case in two death penalty cases not readily distinguishable from this one. *(People v. Keenan, supra,* 46 Cal.3d at pp. 505-507 [according law-of-the-case effect to Court of Appeal decision denying capital defendant's petition for mandate to compel discovery]; *People v. Ghent, supra,* 43 Cal.3d at pp. 758-760 [according law-of-the-case effect to Court of Appeal decision denying relief from trial court's denial of motion to sever counts (§ 954)]; see also *People v. Mattson* (1990) 50 Cal.3d 826, 850, fn. 9 [268 Cal.Rptr. 802, 789 P.2d 983] [dictum].)

Consequently, that this is a capital case does not bar application of the law-of-the-case doctrine to the search issues. Absent a manifest misapplication" of the law resulting in substantial injustice" *(Shuey, supra, 13* Cal.3d at p. 846) or an intervening change in the law *(Ramos, supra,* 37 Cal.3d at p. 146), the Court of Appeal decision should stand as the law of the case.

b. *Issues Decided*

The Court of Appeal upheld the search of the Camaro and the search of the Stanley home,

including the parole search of Stanley's room.[4] The court also upheld the search of defendant's mother's pickup, the interception of defendant's jailhouse mail and communications with visitors, and the search and seizure pursuant to warrant of evidentiary samples from defendant's body, but no evidence from these latter searches was admitted at trial. Finally, the court held invalid the June 1974 warrant search of defendant's home and pickup wck, during which police had seized (but later returned) the same Marlin .30-.30 rifle that was seized in the trunk of the Camaro and entered into evidence as People's exhibit lKo. 28. Consequently, the jury was not permitted to know that the rifle had been in defendant's possession six years earlier.

Defendant makes the same challenges to the approved searches as were disposed of by the Court of Appeal. Therefore, unless the Court of Appeal opinion rests on a "manifest misapplication of existing principles resulting in substantial injustice"

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[4]In connection with its decision, the court of appeal upheld the validity of the search warrants used in the August 13 search of the Camaro by Lake County authorities, the August 20 search of the Camaro by Colousa County authorities, and the August 21 search of the Stanley home. With respect to the latter two warrants, the court did not rule on the merits but, rather, refused to consider defendant's contentions because of his failure to provide any citation to the record or to relevant authority. Defendant likewise fails in the instant appeal.

(Shuey, supra, 13 Cal.3d at p. 846), or there has been an intervening determination altering the controlling rules of law *(Ramos, supra,* 37 Cal.3d at p. 146), that court's decision should be law of the case. As noted above, our mere disagreement, if any, with the Court of Appeal's r determination is not of itself a sufficient basis for finding the decision unjust. (*Shuey, supra,* 13 Cal.3d at p. 846.)

The Court of Appeal opinion does not disclose a "manifest misapplication of existing principles resulting in substantial injustice" such as would justify reexamination of the issues decided. *People v. Scott* (1976) 16 Cal.3d 242, 247 [128 Cal.Rptr. 39, 546 P.2d 327], cited by defendant, is distinguishable. There the Court of Appeal purported to apply one of this court's decisions, but in fact misunderstood and misapplied the case. Here the authorities relied on by the Court of Appeal fully support its conclusions. Indeed, although defendant argues the court erred, he does not attempt to bring any asserted error within the standard of "a manifest misapplication of existing principies" *(Shuey, supra,* 13 Cal.3d at p. 846).

Defendant contends, however, that in upholding defendant's arrest at the Stanley home, the Court of Appeal misread the record. In applying the doctrine of inevitable discovery, the Court of Appeal stated the trial court found that police would have looked for defendant at his mother's house irrespective of the allegedly illegal prior search for him at his sister's house. According to defendant, the trial court did not so find because the prosecu tion never asked it to.

Defendant's assertion is unsupported by the record. In upholding defend ant's arrest, the trial court first stated its belief the officers had properly come by the information that defendant was not at his sister's house. Continuing, the court stated: "But even without that information, I would feel that the other circumstances are intervening and independent. *And the People don't have to rely upon the search [of defendant's sister's residence] as being a basis for proceeding to the [Stanley] residence.*" (Italics added.)

From this the Court of Appeal determined the trial court found "that regardless of the search of Stanley's sister's home, the police independently would soon have sought Stanley where he resided nearby with his mother and son." The Court of Appeal's reading of the record is manifestly reason able; hence, defendant has failed to demonstrate any reason to justify excepting this part of the court's decision from application of the law-of the-case doctrine.

c. Intervening Change in Law: Parole Search

At the time of the offense defendant was subject to a general parole search condition.[5] Concurrent with the police search of the Stanley

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[5]Defendant had acceded to the condition tht he and his residence nd property under control "may be search without a warrant by any agent of hte Department of Corrections *or any law enforcement officer.*" (italics added.)

home, defendant's parole agent, John Ransom, conducted a parole search of defendant's bedroom. In upholding the police search, the Court of Appeal, in an alternative holding, relied on defendant's parole condition. (See, e.g., *People v. Icenoge* (1977) 71 Cal.App.3d 576, 585 [139 Cal.Rptr. 637] *(Icenogle).)* (2) Relying on this court's subsequent decisions in *People v. Burgener* (1986) 41 Cal.3d 505, 528-529 [224 Cal.Rptr. 112, 714 P.2d 1251] *(Burgener)* and *People v. Johnson* (1988) 47 Cal.3d 576 [253 Cal.Rptr. 710, 764 P.2d 1087] *(Johnson),* defendant argues the Court of Appeal erred.

Burgener, supra, and *Johnson, supra,* stand for the principle that a parole search is reasonable under the Fourth Amendment "if there is a reasonable nexus (a direct and close relationship) between the search and the parole process, and a reasonable suspicion, based on articulable facts, that the parolee has violated the tersns of his parole or engaged in criminal activity."(*Johnson, supra,* 47 Cal.3d at p. 594.) Neither police participation nor the let the parolee is already under atrest invalidates an otherwise proper parole llpervision purpose. *(Ibid.;* see *Burgener, supra,* 41 Cal.3d at p. 536.)

Defendant maintains that because his parole agent was operating indepenlastly of the police and did not authorize their search, there was no requisite Lexus between the police search and his parole condition. Significantly, he bet not argue that if agent Ransom had authorized the police search, it could nevertheless have lacked a proper parole supervision purpose. Clearly, investigation of defendant's involvement in a murder would have a

Mole supervision purpose. *(Burgener, supra,* 41 Cal.3d at p. 536; see also *People v. Brown* (1989) 213 Cal.App.3d 187, 192 [261 Cal.Rptr. 612].) ¦0

The question, then, is whether *Burgener, supra,* and *Johnson, supra,* should be applied retroactively to invalidate the Court of Appeal's alternative parole-search theory, based on then-valid law *(Icenogle, supra,* 71 Cal.App.3d at p. 585). *Donaldson v. Superior Court* (1983) 35 Cal.3d 24 [196 Cal.Rptr. 704, 672 P.2d 110] *(Donaldson)* dictates not. In *Donaldson* this court held that in search and seizure cases a decision that represents a clear break with the past generally should not be given retroactive effect. The reason is that exclusion is neither necessary to ensure the reliability of the fact-finding process at trial, nor does it deter illegal police conduct; hence retroactivity serves no justiciable purpose. *(Id.* at p. 39.)

Because the Court of Appeal correctly applied the law of parole searches as it then existed, we shall not overturn its alternative holding on that point.

In summary, the Court of Appeal decision is the law of the case, and we decline to address defendant's renewed Fourth Amendment arguments.

2. *Failure to Hold Evidentiary Hearing on Transfer of Venue to Butte County*

Defendant contends his conviction and sentence must be reversed because the Lake County Superior Court, having granted the motion for change of

venue, abused its discretion in not holding an evidentiary hearing to determine whether Butte County was an appropriate site for trial.

Defendant bases his argument on *McGown v. Superior Court* (1977) 75 Cal.App.3d 648 [142 Cal.Rptr.262] (*McGown*). There the Court of Appeal construed rule *842* of the California Rules of Court impliedly required the court in which the action is pending to conduct an evidentiary hearing before deciding where the cause should be transferred, while noting parties might **waive their right** to present evidence on the issue.[6] (*McGown, supra,* 75 Cal.App.3d at p. 652.) Because the transferring court in *McGown* had ordered the case transferred to Stanislaus County without affording the defense an opportunity to show the existence of prejudicial publicity there, the Court of Appeal issued a writ of mandate to compel the transferring court to hold a

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[6]The rule provides as follows: "When the court in which the action is pending determines that it should be transferred pursuant to Section 1033 or 1034 of the Penal Code, it shall advise the Administrative Director of the Courts of the pending transfer. Upon being advised the Director shall, in order to expedite judicial business and equalize the work of the judges, suggest a court or courts that would not be unduly burdened by the trial of the case. Thereafter, the court in which the case is pending shall transfer the case to a proper court as it determines to be in the interest of justice." (Cal. Rules of Court, rule 842.)

hearing to determine whether the case should be transferred to Stanislaus County. (*Id.* at pp. 653-654.)

Defendant's contention fails at the threshold because the Lake County Superior Court did hold a hearing before determining the suitability of Butte County for trial of the case. Before and after granting the motion for change of venue, the court repeatedly indicated its awareness of the need for a hearing. Before holding the hearing, the court solicited counsel's views as to the appropriate county of transfer, and both sides named Butte County as their first preference. Counsel and the court noted certain counties would be impracticable as sites for trial, e.g., Colusa, where the "I-5" murder, one of the other crimes to be presented during the penalty phase, occured; Contra Costa, where defendant had previously been convicted of murder; and several other Northern California counties affected by defendant's criminal activities. After submitting the proposal for Butte County to the Administrative Office of the Courts, as required by California Rules of Court, rule 842, the court held a hearing, during which it confirmed that all counsel continued to favor Butte County. The court offered counsel the opportunity to raise any other matter relevant to the venue determination. Only then did the court determine the action should be transferred to Butte County.

Defendant contends these proceedings were insufficient and an evidentiary hearing was required. The contention is meritless. All parties agreed there were no factual issues to be resolved before

determining the place to which the case would be transferred. Under these circumstances, it is difficult to grasp the point of an evidentiary hearing. Defendant reminds us of the importance of choosing a venue where a fair trial can be had and recites the factors courts must consider in determining venue—the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of publicity. (See, e.g., *People v. Proctor* (1992) 4 Cal.4th 499, 523-528 [15 Cal.Rptr.2d 340, 842 P.2d 1100].) He fails, however, to show the parties in this case did not consider those factors. Accordingly, the court did not err in failing to hold an evidentiary hearing to determine the suitability of Butte County as the trial venue. *People v. Cooper* (1991) 53 Cal.3d 771, 804 [281 Cal.Rptr. 90, 809 P.2d 865], cited by Defendant, does not assist him, for it merely holds (as relevant here) that the trial court, not the defendant, determines the trial venue.

Defendant's related claim—that his trial counsel was ineffective in not demanding an evidentiary hearing to determine the proper transferee court—consequently must fail as well. He has not shown that trial counsel's performance fell below the standard of reasonable professional competence or that it is reasonably probable a determination more favorable to him would have resulted, in the absence of counsel's asserted shortcomings. *(Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693, 104 S.Ct. 2052]; *People v. Fauber* (1992) 2 Cal.4th 792, 831 [9 Cal.Rptr.2d 24, 831 P.2d 249].) Nothing in the record suggests,

contrary to trial counsel's expressed preference for Butte County, that counsel possessed information indicating a need for an evidentiary hearing. Our scrutiny of counsel's performance is deferential; we will not indulge in speculation that trial counsel might have conducted further investigation that might have led to the discovery of such information. (See *Strickland v. Washington, supra,* 466 U.S. at pp. 688-689 [80 L.Ed.2d at pp. 693-694].) Furthermore, nothing in the record hints the choice of Butte County prejudiced defendant. Indeed, in denying a defense motion to sequester the jury at the end of the guilt phase, the trial court commented on the lack of media coverage of the trial in Butte County. Thus, we find neither impropriety in the transfer to Butte County, nor ineffective assistance of counsel in this connection.

3. Sufficiency of Evidence

Defendant asserts the record contains insufficient evidence to support his conviction of murder and the jury's findings on the special circumstance allegations. On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *(People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738, A.L.R.4th 1255]; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574, 99 S.Ct. 2781].) The standard of review is the same in cases in which the

People rely mainly on circumstantial evidence. *(People v. Bean* (1988) 46 Cal.3d 919, 932 [251 Cal.Rptr. 461, 760 P.2d 996].) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]" *(Id.* at pp. 932-933.) "'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.'" *(Id.* at p. 933, quoting *People v. Pierce* (1979) 24 Cal.3d 199, 210 [155 Cal.Rptr. 657, 595 P.2d 91].)

Defendant does not specify how the evidence fails to support the verdict. Instead, he merely refers us to the statement of facts contained in his opening brief, apparently assuming this court will construct a theory supportive of his innocence and inconsistent with the prosecution's version of the evidence. That is not our role. "[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]" (9 Witkin, Cal. Procedure, (3d ed. 1985) Appeal, § 479, p. 469; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15 [2 Cal.Rptr.2d 112, 820 P.2d 214]; *Duncan v. Ramish* (1904) 142 Cal. 686,

689-690 [76 P. 661].) This principle is especially true when an appellant makes a general assertion, unsupported by specific argument, regarding insufficiency of evidence. (9 Witkin, Cal. Procedure, *supra,* Appeal, § 479, p. 469.)

Nonetheless, we have reviewed the record in light of the standard of review enunciated in the authorities discussed above and find it amply supports the judgment.[7] The evidence indicated defendant possessed the weapon and ammunition used to kill Cindy. Defendant earlier had committed felony offenses against her, for which she had brought a criminal complaint against him. He also had burned down her house and torched her car. Following the murder he fled from a police roadblock. After his arrest he made false statements to account for his whereabouts on the night of the crime. These and numerous other facts presented into evidence warranted the jury in finding defendant guilty of murder and the special circumstances true.

4. *Claims of Instructional Error*

a. *First Degree Murder by Lying In Wait*

The jury was instructed on the alternative first degree murder theories of murder by premeditation and deliberation and murder by lying in wait. In connection with lying in wait, the court instructed

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[7]We have considered and decline the Peopless request to strike defendant's sufficiency-of-evldence argument.

the jury, in part, "The term, quote, 'lying in wait,' end quote, is defined as waiting and watching for an opportune time to act, together with concealment by ambush or by some other secret design to take the other person by surprise. [¶] The lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (Italics added.) Defendant argues that either deliberation is an element of first degree murder perpetrated by lying in wait, in which case the jury was wrongly instructed, or, if deliberation is not an element, conviction of first degree murder by lying in wait is a denial of a defendant's constitutional rights.

The court did not err in instructing the jury in the disjunctive that the duration of the lying in wait must show either premeditation or deliberation. As we held in *People v. Ruiz* (1988) 44 Cal.3d 589, 614-615 [244 Cal.Rptr. 200, 749 P.2d 854], the instruction's disjunctive phraseology is neither inappropriate nor misleading. (See also *People v. Hardy* (1992) 2 Cal.4th 86, 162-163 [5 Cal.Rptr.2d 796, 825 P.2d 781].)

Defendant maintains, however, that in classifying nondeliberating murderers the same as those who deliberate their killings, the Legislature has created a "suspect class" that affects a fundamental liberty interest, thus placing on the People the burden to establish a "compelling interest" and demonstrate the distinctions are necessary to further that purpose. *(People v. Olivas* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55, 551 P.2d 375].)

Defendant's premise the Legislature has created a suspect class is mistaken.[8] To prove first degree murder of any kind, the prosecution must first establish a murder within section 187—that is, an unlawful killing with malice aforethought. *(People v. Dillon* (1983) 34 Cal.3d 441, 465 1194 Cal.Rptr. 390, 668 P.2d 697]; *People v. Mattison* (1971) 4 Cal.3d 177, 182-183 [93 Cal.Rptr. 185, 481 P.2d 193]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 475 [212 Cal.Rptr. 440].) Thereafter, pursuant to section 189, the prosecution must prove the murder was perpetrated by one of the specified statutory means, including lying in wait, or "by *any other kind* of willful, deliberate, and premeditated killing, . . ." (Italics added.)[9] Lying in wait is the functional equivalent of proof of premeditation, deliberation,

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[8]We note that in equal protection analysis, "suspect classes" are not legislatively created, but, rather, are constitutionally determined.

[9]At the time relevant to this case, section 189 provided in pertinent part: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed pnmarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is a murder of the first degree; and all other kinds of murders are of the second degree."

and intent to kill. (*People v. Hardy, supra*, 2 Cal.4th at p. 162.) Consequently, treating the two kinds of murder the same is not a violation of equal protection.

Citing *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368], defendant argues that classifying murder by lying in wait as first degree murder violates the Eighth Amendment proscription against cruel and unusual punishment, because the penalties for first degree murder (25 years to life and, if special circumstances are alleged, exposure to capital punishment) are disproportionate to the culpability of a murderer who does not deliberate on the offense.

In *Enmund* the high court held that the death penalty, imposed under the state felony-murder rule, was disproportionate punishment for a robber who did not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. (458 U.S. at p. 797 [73 L.Ed.2d at pp. 1151-1152].) More recently, in *Tison v. Arizona* (1987) 481 U.S. 137, 158 [95 L.Ed.2d 127, 145, 107 S.Ct. 1676], the court held "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (Fn. omitted.) In light of these pronouncements, defendant cannot prevail in his argument that his conviction for first degree murder violates the Eighth Amendment. "Murder committed by lying in wait has been 'anciently regarded . . . as a particularly heinous and repugnant crime.' [Citation.]" *(People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [254 Cal.Rptr. 586,

766 P.2d 1].) The moral culpability of the offender who murders by lying in wait justifies fixing the murder in the first degree. *(People v. Wolff* (1964) 61 Cal.2d 795, 820 [40 Cal.Rptr. 271, 394 P.2d 959]; see also *People v. Morales* (1989) 48 Cal.3d 527, 558 [257 Cal.Rptr. 64, 770 P.2d 244].)

Finally, defendant asserts that if deliberation need not be proved, virtually any premeditated murder can satisfy the requirements of lying in wait and thus be murder in the first degree. He maintains that once the prosecution has proved premeditation, it has, by the same facts, in effect proved lying in wait. This contention is meritless. "Premeditated" simply means "'considered beforehand'" (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 [9 Cal.Rptr.2d 577, 831 P.2d 1159].) For lying in wait, by contrast, the prosecution must prove the elements of concealment of purpose together with "a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. *(People v. Morales, supra,* 48 Cal.3d at p. 557 [lying-in-wait special circumstance].) These circumstances, taken together, present "a factual matrix . . . distinct from 'ordinary' premeditated murder ...." (*Ibid.*)

b. *Instructions on Express Malice*

The trial court instructed the jury that "the crime of murder is the unlawful killing of a human being with malice aforethought." Pursuant to former CALJIC No. 8.11, the court then instructed as follows: "Malice may be either express[] or implied.

Malice is express[] when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base antisocial purpose and in a wanton disregard for human life. [¶] The mental state constituting that malice aforethought does not necessarily require any ill will or hatred of the person killed. 'Aforethought' does not imply deliberation or the elapse *[sic]* of considerable time. It only means that the mental state must precede rather than follow the act." (Italics added.)

Citing *People v. Conley* (1966) 64 Cal.2d 310, 320 [49 Cal.Rptr. 815, 411 P.2d 911], defendant asserts the foregoing instruction erroneously informed the jury they must find express malice if they found intent to kill, thereby creating a mandatory presumption in violation of *In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368, 90 S.Ct. 1068]. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344, 105 S.Ct. 1965]; *Sandstrom v. Montana* (1979) 442 U. S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450].)

Conley is inapposite. There the trial court, in instructing the jury on the elements of murder, instructed on intention, deliberation and premeditation, but omitted any reference to malice. Defendant's defense was diminished capacity. Observing that the mental state of specific intent to kill was not neessarily the same as malice aforethought (64 Cal.2d at p. 320), the court held instructional omission removed from the jury the

issue of defendant's capacity to harbor malice *(id.* at p. 323). Here, by contrast, the jury was fully instructed on malice.

Nor did the instruction erroneously equate malice with intent. When these offenses occurred, "[a]n awareness of the obligation to act within the general body of laws regulating society . . . [was] included in the statutory definition on implied malice in terms of an abandoned and malignant heart *and in definition of express malice as the deliberate intention unlawfully to take life." (People v. Conley, supra,* 64 Cal.2d at p. 322, italics added; see also *People v. Polley* (1983) 147 Cal.App.3d 1088, 1092 [195 Cal.Rptr. 496].)[10] Although an amplifying instruction may have been required if defendant had relied on a diminished capacity defense *(People v. Fusselman* (1975) 46 Cal.App.3d 289, 300-301 [120 Cal.Rptr. 282]; see, generally, *People v. Flannel* (1979) 25 Cal.3d 668, 684 [160 Cal.Rptr. 84, 603 P.2d 1]), defendant's defense of alibi was totally inconsistent with diminished capacity. In the circumstances, the court's instructions were sufficient. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 716-717 [112 Cal.Rptr. 1, 518 P.2d 913]; cf. *People v. James* (1987) 196

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[10]The offenses in this case occurred before the 1981 amendment to section 22 and the enactment of sections 28 and 29. (See generally, *In re Christina S.*(1994) 7 Cal.4th 768, 775 [30 Cal.Rptr.2d 33, 872 P.2d 574]; *People v. Sallie* (1991) 54 Cal.3d 1103, 111-1117 [2 Cal.Rptr.2d 364, 820 P.2d 588].)

Cal.App.3d 272, 289-291 [241 Cal.Rptr. 691].)

c. Instruction on Reasonable Doubt

Citing *Cage v. Louisiana* (1990) 498 U.S. 39 [112 L.Ed.2d 339, 111 S.Ct. 328], defendant contends the use of CALJIC No. 2.90[11] denied him due process of law because the standard instruction impermissibly lightened the prosecution's burden to prove his guilt beyond a reasonable doubt. Specifically, he criticizes the instruction for employing the term "moral certainty," urging it suffers from vagueness and improperly introduces subjective moral and ethical considerations in place of the objective evidentiary concerns on which the law requires the jury to focus. Recently the United States Supreme Court upheld the constitutionality of the instruction. *(Victor v. Nebraska* (1994) 511 U.S.

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[11]"CALJIC No. 2.90 defines "reasonable doubt" as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." The language of the instruction is drawn from section 1096. If the trial court reads the standard instruction to the jury, by statute no further instruction on reasonable doubt need be given. (See § 1096a.)

___ [127 L.Ed.2d 583, 114 S.Ct. 1239], affirming *People v. Sandoval* (1992) 4 Cal.4th 155 [14 Cal.Rptr.2d 342, 841 P.2d 862].) Although several justices criticized the term "moral certainty," its use in the reasonable doubt instruction does not constitute error. (See 511 U.S. at p. ____ [127 L.Ed.2d at pp. 595-596 (maj. opn. by O'Connor, J.); *id.* at p. ____[127 L.Ed.2d at p. 601] (conc. opn. of Kennedy, J.); *id.* at p. ____ [127 L.Ed.2d at pp. 601-604] (conc. opn. of Ginsburg, J.); see also *People v. Freeman* (1994) 8 Cal.4th 450, 503-504 [34 Cal.Rptr.2d 558, 882 P.2d 249] [holding CALJIC No. 2.90 constitutional].)

5. *Denial of Representative and Impartial Jury*

Defendant contends the exclusion of some potential jurors for cause in accord with *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] (jurors unalterably opposed to the death penalty) denied him his federal and state constitutional rights to an impartial and representative jury. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16.) The United States Supreme Court has rejected these contentions *(Lockhart v. McCree* (1986) 476 U.S. 162 [90 L.Bd.2d 137, 106 S.Ct. 1758]), as have we *(People v. Babbitt* (1988) 45 Cal.3d 660, 679 [248 Cal.Rptr. 69, 755 P.2d 253]).

B. *Special Circumstance Issues*

1. *Denial of Severance*

Defendant maintains the trial court erred in

denying his motion to sever trial of the witness-murder special circumstance from the guilt phase and to try it with the prior murder allegation already severed. He argues the court's ruling deprived him of the opportunity to present the defense that he killed his wife for a reason other than prevention of her testimony (e.g., "love"), because such a defense would have required him to admit he killed her. Defendant asks this court to rule that when a special circumstance allegation goes to the motive of the charged killing, the defendant is entitled to severance of the allegation.

We decline to adopt the rule defendant suggests. First, in this case defendant did not base his severance motion on the grounds he now advances. Rather, he sought severance to prevent the introduction of evidence concerning the nature of the charges brought by Cindy against him and witnessed by her (rape, forcible oral copulation, corporal punishment) and other prejudicial evidence related to those charges. Before ruling on the severance motion, the court suggested the jury could be informed, through stipulation, that Cindy had charged three felony counts against defendant. The prosecutor agreed to so limit the People's evidence. Then, after weighing probative value and other factors under Evidence Code section 352, the trial court denied the motion for severance. At no time did the defense suggest severance was necessary to permit defendant to present the inconsistent defenses of alibi to the murder charge and "I killed her for love, not because she was a witness" to the special circumstance allegation.

Second, section 190.1 provides for a unitary trial of the guilt and special circumstance issues, except as therein provided.[12] Although more than half of the statutory special circumstances involve motive (§ 190.2, subd. (a)(1),(5), (7), (8), (10), (11), (12), (13), (16)), the statute does not except those circumstances from trial at the same time as trial of the issue of guilt. In *People v. Bigelow* (1984) 37 Cal.3d 731 [209 Cal.Rptr. 328, 691 P.2d 994, her 64 A.L.R.4th 723], this court suggested there should be an exception to the simultaneous proceeding called for by section 190.1 when evidence relevant upon only to a special circumstance "is highly prejudicial," in which case "the trial court should exclude it at the guilt trial and conduct a separate trial of the special circumstance allegations." (37 Cal.3d at p. 748, fn. omitted.) Barring such "highly prejudicial" evidence, a unitary trial is the rule and severance the exception, to be

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[12]Section 190.1 provides in pertinent part: "A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows: [¶] (a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall *at the same time* determine the truth of all special circumstances charges as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree." (Italics added.)

granted only when the jury's ability to render a fair and impartial verdict on the special circumstances would otherwise be impaired. *(Peopk v. Fierro* (1991) 1 Cal.4th 173, 229 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

In the instant case, the allegedly prejudicial evidence of the nature of defendant's charged crimes against Cindy was excluded by stipulation of the parties. The remaining evidence was admissible as relevant to defendant's motive. (Cf. *People v. Edelbacher, supra,* 47 Cal.3d at p. 1028.) Denial of defendant's severance motion was not an abuse of discretion.

2. *Inconsistent Instructions*

Pursuant to CALJIC No. 2.51, the court instructed the jury that "[m]otive is not an element of the crime charged and need not be shown." Pursuant to CALJIC No. 8.81.10, the court also instructed the jury that in determining the truth of the witness-murder special circumstance, they had to determine whether the victim was killed for the purpose of preventing her testimony. Defendant argues that because motive and purpose are synonymous, the two instructions were inconsistent and may have misled the jury to defendant's prejudice.

We rejected a similar contention in *People v. Edelbacher, supra.* 47 Cal.3d at page 1027. As there stated, "The 'crime charged' was murder and any reasonable juror would have understood the instruction as referring to this substantive offense

only and not to any special circumstance allegation." (*Ibid.*; accord, *People v. Noguera* (1992) 4 Cal.4th 599, 637 [15 Cal.Rptr.2d 400, 842 P.2d 1160].)

3. *Dominant Purpose of the Killing*

Pursuant to the standard instructions, the court instructed the jury that to find the witness-murder special circumstance true, they must find, inter alia, that "the witness was intentionally killed for the purpose of preventing her testimony in a criminal proceeding (CALJIC No. 8.81.10.) Defendant contends the court erred in failing to instruct the jury sua sponte that to find the special circumstance true, they must find the *predominant* purpose of the murder was to prevent the victim's testimony. He maintains that if he would have killed Cindy in any event for other reasons, application of the witness-murder special circumstance to impose the death penalty fails to serve the dual goals of retribution and deterrence, in violation of his right to due process and freedom from cruel and/or unusual punishment. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 781-782 [230 Cal.Rptr. 667, 726 P.2d 113].)

Defendant's argument is specious. The trial court correctly instructed the jury in the language of the statute. More is not required. A defendant who kills his victim in furtherance of more than one purpose is not thereby less culpable than one whose crime has a single purpose. So long as one purpose of defendant was to prevent the victim from testifying against him, the electorate could reasonably conclude that sentencing him to death would fulfill

the dual social purposes of retribution for his deed and deterrence of others. Moreover, a contrary rule would unjustifiably reward defendant for having a criminal ambition greater than one whose killing is motivated only by the desire to eliminate a witness. (*People v. Sanders* (1990) 51 Cal.3d 471, 519 [273 Cal.Rptr. 537, 797 P.2d 561].)

Riley v. State (Fla. 1978) 366 So.2d 19 and other Florida cases relied on by defendant are inapposite. In Florida there is no special circumstance directed at murder for the purpose of preventing testimony. One aggravating circumstance, however, that can render a murderer eligible for the death penalty is that the murder was committed "for the purpose of avoiding or preventing a lawful arrest." (See Fla. Stat. Ann. § 921.141.) The Florida Supreme Court found that this circumstance, although concerned primarily killing of law enforcement officers, could also validly be applied when the victim was not a law enforcement officer. However, because its application to civilians would invariably arise during the defendant's commission of another felony, to avoid overlap in that instance with Florida's felony-murder aggravating circumstance, the court held "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." (366 So.2d at p. 22.) Thus, in *Menendez v. State* (Fla. 1979) 368 So.2d 1278, 1282, involving a store owner killed during a robbery, the court held that for the aggravating circumstance to apply, it must clearly be shown "the

dominant or only motive" for the murder was the elimination of witnesses. (Accord, *Herzog v. State* (Fla 1983) 439 So.2d 1372, 1378-1379 [no evidence of previous crime to which a victim was a witnesss.

Like Florida, this court also has determined that it is appropriate to construe special circumstances in such a way as to minimize the application of multiple special circumstances arising out of the same conduct, (*People v. Bigelow, supra,* 37 Cal.3d at p. 751.) Unlike Florida, however, the California witness-murder special circumstance expressly excludes a killing committed during the commission of the crime to which the victim was a witness. (§ 190.2, subd. (a)(10); see *People v. Garrison* (1989) 47 Cal.3d 746, 792 [254 Cal.Rptr. 257, 765 P.2d 419]; *People v. Silva* (1988) 45 Cal.3d 604, 631 [247 Cal.Rptr 573, 754 P.2d 1070].) Hence, the reason for Florida's "dominant purpose" rule does not exist. When the reason fails, so should the rule. (See Civ. Code, § 3510.)

The elements of the witness-killing special circumstance are: "(1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed." (*People v. Garrison, supra,* 47 Cal.3d at p. 792.) If the defendant intentionally kills a would-be witness for the purpose of preventing the victim from testifying in a criminal proceeding, it is not a defense to the special circumstance allegation that he had another purpose as well. (*People v. Sanders, supra,* 51

Cal.3d at p. 519.)

C. *Compentency Trial*

1. Background

During the penalty phase of trial, after the prosecution had presented its case and in the course of the defense case, the trial court suspended proceedings under section 1368, subdivision (b)[13] and ordered a trial on the issue of defendant's present mental competence, pursuant to section 1369.[14]

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[13]Section 1368, subdivision (b) provides in relevant part: "If counsel informs the court that he believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Section[] . . . 1369."

[14]Section 1369 provides for the appointment of one or two psychiatrists or psychologists to examine the defendant and sets forth the order of proceedings at the trial of the issue of the defendant's mental competence. The section concludes: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury [in a jury trial] shall be unanimous." (*Id.* subd. (f).

The issue of defendant's possible incompetency arose when defendant refused to waive his attorney-client, psychotherapist-patient and Fifth Amendment privileges to allow the testimony of Dr. David Axelrad and the admission into evidence of twelve and one-half hours of videotaped hypnotic and narcohypnotic interviews conducted by Axelrad.

Defendant's counsel decided belatedly to use this evidence, originally believing they would not, with cocounsel Petersen and defendant having favored using it and counsel Neill having taken a contrary position. On the sixth day of the prosecution's penalty case, both counsel concluded the evidence was critical to defendant's case in mitigation. Defendant had expressed his preference for life over death. In light of the overwhelming aggravating evidence against defendant, both defense attorneys believed the testimony would provide his only chance for leniency, as the tapes would pemmit the jury to see him talk openly and with feeling about many subjects, and to appreciate the relationship between his lifetime of rejection and his resultant violence. Defendant gave various reasons for his refusal to waive the privileges, both personally to the court and through his attorneys. These included that he had originally assumed that Dr. Axelrad would testify concerning his drug and alcohol use, but not under the assumption he was guilty or had mental problems consistent with guilt. Defendant did not want his mental problems and his adverse comments about his mother and other relatives to become part of the public record for his children to see. He was also concerned certain incidents discussed in the tapes would have an

adverse effect on the jury and would incriminate him in other matters. The adverse information included acts of violence against his parents (stabbing his father and attempting to choke his mother), the rape of Cindy, and the mysterious disappearance of his third wife, Diana Lynn.[15] Defense counsel told the court defendant had expressed less rational concerns to them. These included retaliation against his attorneys for calling his mother as a witness in the penalty trial, not wanting to be present in court while the tapes were played because he was self-conscious, wanting the proceedings to be over so he could visit with his older son before he left for college, and retaliation against his attorneys for their failure to intervene in his custody battle for his two younger children, who were with their maternal grandparents. On August 18, 1983, defense counsel for the first time informed the court they thought defendant might be mentally incompetent to rationally assist counsel as provided in section 1367.[16] (Only three days before, counsel had

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[15]Diana Lynn was defendant's third wife. Her whereabouts apparently have never been established. Linda Faith was defendant's first wife. Kathy Rhiley, the victim of defendant's prior second degree murder conviction, was defendant's second wife. Cindy Rogers, the victim in the instant case, evidently was defendant's fourth wife.

[16]As relevant at the time of trial, secuon 1367 provided in relevant part as follows: "A person cannot be tried or adjudged to punishment while such person

informed the court that, although defendant was not cooperating with them in relation to the presentation of Dr. Axelrad's testimony, they agreed he had the capacity to cooperate and was not "1368.") On August 26, 1983, after hearing the in camera testimony of Dr. Axelrad, the court found a prima facie case had been established that defendant was incompetent. The court ordered proceedings suspended for a section 1368 competency hearing. At the commencement of the competency proceedings, the court appointed two psychiatrists to examine defendant. Thereafter, pursuant to defendant's objections to the appointed psychiatrists, the court vacated its prior appointments and permitted the prosecution and defense each to nominate a psychiatrist. Because defendant also objected to the competency hearing, the trial court asked whether he wished the court to appoint an attorney to represent him, either in conjunction with his present counsel or without his present counsel. Defendant stated he wished the court to appoint counsel to serve with his present counsel. The trial court, without objection, thereupon appointed Attorney Blake to serve in connection with the competency proceedings, in

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is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if. as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Section 1367 was subsequently amended in ways not significant for this case. (See Stats. 1992, ch. 722, § 10.)

addition to defendant's other counsel.

The competency trial was by jury. Evidence was presented in three phases. In the first phase, defense counsel Petersen presented evidence of defendant's incompetence. Cocounsel Neill and Dr. Axelrad testified and the videotapes of defendant's interview with Axelrad were played for the jury. In the second phase, Attorney Blake presented evidence of defendant's competence. He called two witnesses, jailer Randy Smith and defendant's former cellmate Bobby Martinez. In the third phase, the prosecution presented the testimony of the two court-appointed psychiatrists selected by the opposing parties and the testimony of the captain in charge of the Butte County jail. The jury found defendant competent. The penalty trial thereupon resumed.

2. *Appointment of Third Attorney*

Defendant maintains the court erred in appointing a third attorney, Mr. Blake, to represent defendant's view he was in fact competent. He argues the court thereby created a team of two conflicting lawyers to represent him at the sane time, in violation of his due process right to effective representation and his right to equal protection of the laws. According to defendant, the court should have either declared a conflict and substituted a new attorney to represent defendant or recognized there was no true conflict and left defendant' s representation entirely to his defense attorneys. In addition, he contends both counsel rendered ineffective assistance during the competency

proceedings.

Observing that defendant ultimately allowed his attorneys to present Dr. Axelrad's testimony and to show the videotapes at the penalty trial, the Attorney General contends that all issues related to defendant's competency trial are moot. Distinguishing *Pate v. Robinson* (1966) 383 U.S. 375 [15 L.Ed.2d 815, 86 S.Ct. 836] and *People v. Pennington* (1967) 66 Cal.2d 508 [58 Cal.Rptr. 374, 426 P.2d 942], which found denial of a defendant's right to a competency hearing prejudicial per se, the Attorney General observes that here, unlike in *Pate, supra,* and *Pennington, supra,* (1) defendant was granted a full hearing (filling 11 volumes of transcript, most of it in support of defendant's incompetency), and (2) once defendant agreed to cooperate with counsel in admitting the evidence, the sole basis for the competency hearing disappeared. The Attorney General reasons any error in conducting the proceedings was therefore harmless beyond a reasonable doubt.

Although the Attorney General's mootness argument is not without some force, we do not rest our decision on that basis. (Cf. *People v. Pennington, supra*, 66 Cal.2d at p. 521 [error in denying competency hearing not curable by retrospective determination of defendant's mental competence during trial]; see also *People v. Hale* (1988) 44 Cal.3d 531, 541 [244 Cal.Rptr. 114, 749 P.2d 769].) Rather, we reject defendant's argument the court's options were limited to the stated choices.

Once the accused has come forward with substantial evidence of incompetence, due process requires a full competency hearing be held. *(Pate v. Robinson, supra,* 383 U.S. at p. 377 [15 L.Ed.2d at pp. 817-818]; accord, *People v. Pennington, supra,* 66 Cal.2d 508, 516-518.) Because in that circumstance there has been a prima facie showing of incompetence, the attorney representing the defendant is required to "advocate the position counsel perceives to be in the client's best interests even when that interest conflicts with the client's stated position." *(Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 28 [225 Cal.Rptr. 328] *(Shephard);* see also *People v. Hill* (1967) 67 Cal.2d 105, 115, fn. 4 [60 Cal.Rptr. 234, 429 P.2d 586].) Thus, when counsel believes his client may be incompetent, and the trial court, pursuant to section 1368, has declared a doubt of defendant's competence, defendant is not deprived of effective assistance if defense counsel overrides defendant's desire to present only evidence and argument of competence. *(Shephard, supra,* at p. 29; *People v. Bolden* (1979) 99 Cal.App.3d 375, 379-380 [160 Cal.Rptr. 268] *(Bolden);* see also *People v. Masterson* (1994) 8 Cal.4th 965 [35 Cal.Rptr.2d 679, 884 P.2d 136].)

In *Shephard, supra,* the Court of Appeal held the trial court erred in relieving defense counsel and appointing private counsel to represent defendant at the competency hearing because defendant had indicated he wished to be found competent. Rather, the court approved the procedure in *Bolden, supra,* 99 Cal.App.3d 375, where counsel allowed defendant to testify as to his own present

competence, then presented evidence of incompetence. *(Sheppard, supra,* 180 Cal.App.3d at pp. 28-29.) "Allowing a defendant to compel his counsel to argue competency (and suppress contrary evidence) would . . . be increasing the danger of a prima facie incompetent defendant subjecting himself to a guilty verdict at a trial where there is substantial likelihood that he would be unable to assist his counsel in a rational manner." *(Id.* at p. 30.)

In *People v. Stankewitz* (1982) 32 Cal.3d 80 [184 Cal.Rptr. 611, 648 P.2d 578] *(Stankewitz),* however, this court recognized there may be situations when appointment of substitute counsel could avoid the necessity for a competence trial. In that case, as here, defendant and counsel had a fundamental disagreement as to trial tactics. Although the court-appointed psychiatrist testified to defendant's mental disorder and further opined that due to his fixation upon the public defender, defendant might be able to rationally assist private counsel, the trial court refused either to conduct a competence trial or to appoint substitute counsel. We recognized that, in the particular circumstances, a substitution of counsel might have avoided altogether the necessity for ordering a full competency hearing. Because the court had done neither, denial of a competency hearing required reversal. *(Id.* at p. 94.)

Here, as in *Stankewitz, supra,* defendant's asserted incompetence manifested itself in a fundamental disagreement with counsel about trial tactics. Unlike in *Stankewitz,* however, the court

afforded defendant a full competency hearing. And unlike in *Shephard, supra,* 180 Cal.App.3d 23, the court, notwithstanding defendant's contrary wish, permitted defense counsel to present the case for incompetence in the belief it was in defendant's best interests. That the court, without objection, acted further to protect defendant's interest by appointing an additional attorney to represent defendant's personal point of view did not deprive defendant of due process or the effective assistance of counsel. Defendant's contrary argument is premised on the false belief a defendant in a competency proceeding has only one iterest--to be found incompetent. However, unlike a criminal defendant, whose legal interest lies in being found not guilty whether he is guilty or not, the defendant in a competency proceeding has not only the right not to be tried for a criminal offense when he is incompetent; he has an equally important interest in not being sent to a mental institution with his criminal case unresolved, if he is competent. (See, generally, § 1370, subd. (a)(1); *People v. Mayes* (1988) 202 Cal.App.3d 908, 915, 917-918 [248 Cai.Rptr. 899].) The appointment of Attorney Blake served this latter interest.[17]

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[17]We therefore reject defendant's claim that Attorneys Neill and Petersen rendered ineffective assistance by not objecting to Blake's appointment. We further conclude Blake was not ineffective in presenting evidence of defendant's competency rather than standing mute or assisting Attorney Petersen in trying to establish defendant's incompetency.

The trial court was presented with a complex situation involving a fundamental disagreement between defendant and counsel concerning the presentation of mitigating evidence, which conflict prompted counsel to state the belief defendant might not be capable of rationally assisting in his defense within the meaning of section 1367. Although the court was required as a matter of law to hold a competency hearing once Dr. Axelrad made a preliminary prima facie showing of defendant's incompetence (*Stankewitz, supra,* 32 Cal.3d at p. 93), because the root of the problem was defendant's refusal to permit mitigating evidence, the issue was far from clear. Thus, in *People v. Guzman* (1988) 45 Cal.3d 915, 964-965 [248 Cal.Rptr. 467, 755 P.2d 917], we held a defendant's refusal to present mitigating evidence and his preference for death is not by itself substantial evidence of incompetence requiring the trial court sua sponte to order a competency hearing. Further, in *People v. Lang* (1989) 49 Cal.3d 991, 1029-1033 [264 Cal.Rptr. 386, 782 P.2d 627], we expressly recognized a defendant's refusal for personal reasons to permit counsel to present mitigating evidence is entitled to respect. (See also *People v. Howard* (1992) 1 Cal.4th 1132, 1163, 1185 [5 Cal.Rptr.2d 268, 824 P.2d 1315].)

To accept defendant's argument the appointment of Attorney Blake interfered with his "real" rights under section 1368, or somehow negated the efforts of Attorney Petersen or detrimentally affected the "appearance of the defense team," would be to prejudge the issue of his competence. The defendant is presumed to be

competent. (§ 1369, subd. (f); *People v. Medina* (1990) 51 Cal.3d 870, 881-885 [274 Cal.Rptr. 849, 799 P.2d 1282].) In appointing separate counsel to represent defendant's point of view, the trial court acted to resolve a conflict, not create one. In so doing it permitted the jury to hear every side of the issue of defendant's competence, thereby assuring defendant a fair trial.[18] In the circumstances, defendant perhaps got more than he was entitled to. But we are unable to conclude he thereby was denied due process.[19]

Defendant's cryptic argument the appointment of Attorney Blake denied him equal protection of the laws is equally meritless. Defendant seems to contend that, because there is no other reported case in which a trial court, in section 1368

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[18]Defendant's argument the prosecution could adequately present the case for defendant's competence ignores the practical and constitutional impediments to defendant's cooperating with the prosecutor on this issue (e.g., the attomeyclient privilege and the Fifth Amendment). Only someone in a confidential attorney-client relationship with defendant would be able to present evidence or cross-examine witnesses based on knowledge gained from defendant himself.

[19]Our determination the appointment of a third attorney did not create a conflict makes it unnecessary to address the argument he did not effectively waive his right to conflict-free representation.

proceedings, appointed additional counsel for a criminal defendant who differed with defense counsel regarding his own competency, he was disadvantaged compared with other similarly situated defendants. His equal protection claim depends on the argument the trial court erred in appointing Attorney Blake. As we have rejected that argument, we perforce reject his equal protection claim.

3. *Number of Jury Challenges*

Defendant argues the court erred in failing to accord both defense attorneys, Mr. Petersen and Mr. Blake, 26 peremptory challenges each, as was required in capital cases at the time of this trial. (Former § 1070, repealed by Stats. 1988, ch. 1245, § 30; see now Code Civ. Proc., § 231, subd. (a) [providing for 20 peremptory challenges for each side in criminal cases punishable by death or life imprisonment].) This argument is meritless.

"A proceeding to determine the mental competence of a criminal defendant to stand trial pursuant to . . . section 1368 is a special proceeding civil in nature." *(People v. Superior Court (McPeters)* (1985) 169 Cal.App.3d 796, 798 [215 Cal.Rptr. 482], citing *People v. Hill, supra,* 67 Cal.2d at p. 114; see also *People v. Fields* (1965) 62 Cal.2d 538, 540 [42 Cal.Rptr. 833, 399 P.2d 369, 16 A.L.R.3d 708].) Consistent with this view, this court has held the parties in a section 1368 proceeding are entitled only to the number of peremptory challenges provided for in civil trials, even if the underlying offense is punishable by death or life

imprisonment. *(People v. Lawson* (1918) 178 Cal. 722, 728729 [174 P. 885].)

In the instant case the parties and the court discussed the number of peremptory challenges that would be permitted.[20] The court rejected allowing 26, as the proceeding did not involve a finding on a capital offense, but rather was an ancillary proceeding that could arise out of any criminal offense. The court saw its choice as between six or ten challenges, depending on whether the matter was more civil or criminal in nature. With the agreement of the parties, the court decided that because the hearing arose out of a criminal proceeding, 10 challenges would be allowed on each side. Subsequently, Attorney Blake suggested that the situation of the defense, with two counsel representing defendant, was analogous to a trial with two defendants who would sometimes have separate interests, in which case each defense attorney is allowed 10 challenges jointly and 5 separately, and the prosecution is allowed a total of 20 challenges. (Former § 1070.5, subd. (a),

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[20]Although defendant states he "moved" for 26 peremptory challenges, the record does not reflect a formal motion. Rather, during a discussion of various procedural aspects of the competency trial, when the court asked for counsel's position on the applicable number of challenges, Attorney Blake stated, "As I understand it, there is no guidance, and perhaps out of an abundance of caution, one should revert back to the number being used in this case, that being 26."

repealed by Stats. 1988, ch. 1245, § 31.) The court asked the parties if that would be an acceptable compromise. All three counsel stated it would. The record shows that defense counsel Petersen (with Blake's consent) exercised all 10 joint challenges, along with his own 5. The prosecution exercised only eight peremptory challenges.

We adhere to our decision in *Lawson, supra,* that the rule applicable to civil trials applies. Consequently, the defense was granted more peremptory challenges than it was entitled to.[21]

4. *Sufficiency of Evidence of Competency*

Defendant urges the jury's finding of competency is not supported by substantial evidence. He relies on *People v. Samuel* (1981) 29 Cal.3d 489 [174 Cal.Rptr. 684, 629 P.2d 485] *(Samuel).* In that case the defense presented an impressive array of evidence demonstrating Samuel's present inability either to understand the nature of the proceedings against him or to rationally assist in the preparation and presentation of his defense. *(Samuel, supra,* 29 Cal.3d at p. 497.) Five court-appointed psychiatrists, three psychologists, a medical doctor, a nurse, and three

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[21]In view of this conclusion, we need not discuss whether defendant waived this issue in light of the agreement of all counsel to the allocation of peremptory challenges. (Cf. *People v. McPeters* (1992) 2 Cal.4th 1 148, 1 168-1169 [9 Cal.Rptr.2d 834. 832 P.2d 146].)

psychologists, a medical doctor, a nurse, and three psychiatric technicians testified to Samuel's incompetency, and four psychiatric reports were admitted into evidence. *(Id.* at p. 498.) Each witness and every report concluded Samuel was incompetent to stand trial. *(Ibid.*) In response, the prosecution offered no expert testimony and only two lay witnesses, neither of whom contradicted any of the defense testimony. *(Ibid.)* The consensus was that Samuel suffered from three mental disorders: chronic schizophrenia, mental retardation, and organic dysfunction, which combined to cause extremely bizarre patterns of thought and speech. *(Id* at p. 500.) Auditory hallucinations rendered Samuel incapable of attending to surrounding events and conditions. *(Id.* at p. 501.) His comprehension and general fund of information were extremely restricted. *(Ibid.*) In response to inquiry as to why he was in jail, he could give a psychiatrist only a confused and vague idea. *Ibbid.*) Another psychiatrist testified about Samuel's delusions in regard to the criminal process: at one point Samuel declared he would not assist in his defense at all because he would be found guilty and killed by the policemen in court. *(Id.* at p. 502.) He did not know what his attorney was trying to do. *(Ibid)* Prosecution witnesses merely testified regarding Samuel's escape from Patton State Hospital and his ability to perform routine manual tasks. *(Id.* at p. 503.) We concluded the jury could not reasonably reject the persuasive and all but uncontradicted defense evidence proving Samuel's incompetence to stand trial and, accordingly, reversed his conviction. *(Id.* at p. 506.)

This case is not comparable to the virtually one-sided showing of incompetence found in *Samuel, supra,* 29 Cal.3d 489. The evidence presented in support of defendant's incompetency may be summarized as follows: Attorney Neill testified there was no question defendant understood the nature of the proceedings. The only question was whether he was able to cooperate and, if not, whether the inability was the result of a mental disorder. Neill admitted defendant had been competent throughout the lengthy and complex proceedings, until defendant refused to waive the psychotherapist-patient and attorney-client privileges to permit introduction of the taped interviews between defendant and Dr. Axelrad. Neill believed defendant would almost certainly receive the death penalty unless the jury were able to view the tapes. Because defendant wanted life rather than death. Neill felt there was no rational reason not to use the tapes. Defendant's refusal to allow use of the tapes constituted the sole basis for Neill's opinion that he was incompetent. If defendant waived his privileges and allowed Dr. Axelrad to testify, Neill's opinion would change. Neill acknowledged he himself had previously believed the tapes should *not* be used because they contained matters that might prejudice the jury against defendant.

Dr. David Axelrad testified regarding his lengthy evaluations of defendant through interviews and extensive review of medical and family history and records from prior criminal proceedings and the Department of Corrections. Dr. Axelrad diagnosed defendant as having five different psychiatric disorders, among which paranoia primarily affected

his competency. Twice Dr. t Axelrad administered a test to assess defendant's competency to stand trial. The results of the first test marginally supported a competency finding, but Dr. Axelrad believed defendant incompetent. The results of the second test marginally showed incompetency. Test scores depended on Dr. Axelrad's subjective assessment of certain criteria relating to the conduct of criminal proceedings.

In support of defendant's assertion of competency, Attorney Blake presented the testimony of jailer Randy Smith and inmate Bobby Martinez. Smith testified regarding defendant's demeanor and ability to understand jail rules. Martinez testified he and defendant had filed a number of petitions, the preparation of which had required defendant to consult law books.

The prosecution presented the testimony of two court-appointed psychiatrists to establish defendant's competency. Dr. Frederic Whipple testified he examined defendant and found him competent. The examination lasted one and one-quarter hours, within the average for competency examinations. Dr. Whipple reviewed defendant's personal history with him, but examined none of the seven boxes of files and records pertaining to defendant that were delivered to him. Dr. Whipple found defendant suffered from no major mental disorder and exhibited no psychotic mannerisms. Defendant knew he had been convicted and was aware of the possible penalties for his offenses. He understood the functions of the various courtroom personnel. He could not recall

specific problems with his attorneys, although he conceded they had disagreed on what was important at the trial. Dr. Whipple saw no suspiciousness of his attorneys on defendant's part.

Dr. Albert French testified he examined defendant for about an hour and arrived at a finding of competency. Dr. French noted defendant had reported Attorneys Petersen and Neill were his best friends and proclaimed great faith in them. Defendant understood the roles of the judge, prosecutor and jury. Defendant denied any hallucinations, delusions or feelings of being controlled by outside forces. He had daydreams, but no dream persistence. He could not concentrate, was forgetful and had repetitive thoughts. Defendant suffered from claustrophobia and took several medications. Dr. French administered an examination testing defendant's ability to recite numbers and months backward and to repeat words. Dr. French also tested defendant's ability to explain proverbs in order to assess his capacity for abstract thought. Based on his examination, Dr. French found no evidence of a mental disorder. The only indication of paranoia noted by Dr. French was that during their interview, defendant did not face him directly, but spoke at a 90-degree angle. Dr. French opined, however, that a truly paranoid person would not give any information in an interview.

Defendant contends the testimony of Attorney Neill and Dr. Axelrad established his incompentency to stand trial. We disagree. Viewing the evience in the light most favorable to the jury's findings, as we must (*Samuel, supra,* 29 Cal.3d at p. 505), we

conclude the record contains clear and substantial proof, consisting of the expert opinions of Drs. Whipple and French and the lay testimony of Smith and Martinez, to support the jury's finding of defendant's competency.

Defendant disagrees, primarily asserting the testimony of Drs. Whipple and French was legally insubstantial because they admittedly did not review the seven boxes of records provided them, and because each spent only about one hour with defendant before formulating his opinion. Defendant also cites Dr. Whipple's testimony, that he could not "categorically" state defendant was not suffering from paranoia, as demonstrating the insubstanitality of his opinion. We disagree. That Dr. Whipple could not make "categorical" psychiatric diagnoses of defendant as a result of his interview does not mean his testimony on the much more limited question of defendant's competency to stand trial lacked a foundation. Defendant makes no attempt to show the matters on which Dr. Whipple relied were not of the kind normally used by experts in making competency determinations. The failure by Drs. Whipple and French to review the seven boxes ods resulted from defense counsel's apparent failure to narrow the scope of their request to a manageable level. In any event, defendant fails to demonstrate why such review would have been a necessary prerequisite to formation of an expert opinion on the limited issue presented in the competency phase.

Defendant's reliance on *People v. Bassett* (1968) 69 Cal.2d 122 [70 Cal.Rptr. 193, 443 P.2d 777]

(*Bassett*) is misplaced. In *Bassett* we addressed the issue, entirely distinct from that involved in this case, whether the record contained sufficient evidence of defendant's ability to premeditate and deliberate to support a first degree murder conviction. We reversed the defendant's conviction and sentence, finding the prosecution had not sustained its burden of proof. As to two psychiatrists testifying for the prosecution, who rendered their opinions without having examined the defendant, we held their testimony was insubstantial because they adduced no reasoning in support of their conclusions and never attempted to refute the mass of defense evidence to the contrary. (*Id.* at pp. 144-145.) The opinion of the third psychiatrist, who had personally examined the defendant, did not constitute substantial evidence because his testimony revealed he labored under a misunderstanding of the term "premediatation." (*Id.* at pp. 147-148.) Consequently, the judgment in *Bassett* could not stand.

The testimony of Drs. Whipple and French in this case does not suffer from the same infirmities as did that of the psychiatrists in Bassett. Contrary to defendant's contention, the *Bassett* opinion's assertion that "'[m]ore than three or four hours are necessary to assemble a picture of a man'" (69 Cal.2d at p. 142) does not create "minimum interview standards" for this case, which, unlike *Bassett,* involves the limited issue of defendant's competency to stand trial. Other cases defendant cites are factually or procedurally distinguishable. (See *People v. Penntngton, supra,* 66 Cal.2d 508 [defendant was diagnosed as paranoid schizophrenic

and experienced fits of psychotic furor during trial]; *People v. Aparicio* (1952) 38 Cal.2d 565 [241 P.2d 221] [defendant was psychotic at time of trial, suffering delusions of persecution and hallucinations]; *People v. Conrad* (1982) 132 Cal.App.3d 361 [182 Cal.Rptr. 912] [in competency proceeding, both experts testified defendant was psychotic and unable to cooperate with counsel or conduct his own defense in a rational manner]; *People v. Comas* (1977) 74 Cal.App.3d 75 [141 Cal.Rptr. 453] [judgment of conviction reversed for failure to conduct competency hearing]; *In re Newmann* (1976) 65 Cal.App.3d 57 [134 Cal.Rptr. 886] [determining propriety of continued involuntary confinement following finding of incompetency to stand trial due to psychosis and mental retardation]; *People v. Melissakis* (1976) 56 Cal.App.3d 52 [128 Cal.Rptr. 122] Judgment of conviction reversed because evidence of defendant's delusions that came to light after pretrial competency hearing and during trial "completely undermined" the earlier finding of competency to stand trial]; *People v. Humphrey* (1975) 45 Cal.App.3d 32 [119 Cal.Rptr. 74] [judgment revoking probation reversed for failure to hold hearing on defendant's competency to stand trial in light of evidence defendant suffered from paranoid schizophrenia].)

5. *Prosecutorial Misconduct and Motion for Mistrial*

Defendant asserts the trial court improperly denied his motion for mistrial based on alleged prosecutorial misconduct during voir dire. He maintains the court ordered counsel not to voir dire

the jury on the penalty phase evidence of the murder of Cheryl Renee Wright (the Colusa County murder), but the prosecutor nevertheless told the jury he intended to show defendant was guilty of committing another murder in Colusa County.

Defendant's premise the court had ordered the prosecutor not to refer to the Colusa County murder in voir dire is mistaken. The issue arose in the context of an extended discussion among the parties and the court concerning how much information the competency-hearing jury should be given for purposes of voir dire. The court's concern was that a full explication of the case against defendant would consume an undue amount of time. Defense counsel Petersen, presenting the case for incompetence, argued the jury should be given extensive detail, as "this is the time to find out if the prejudicial effect would cause them to not be good jurors." Defense counsel Blake, presenting defendant's personal interest in being found competent, objected to any reference to uncharged criminal activity until the court had ruled on his motion, based on defendant's Fifth Amendment rights, to excise those portions of the videotaped interview with Dr. Axelrad where defendant discussed Cheryl Renee Wright and Diana Lynn. Blake stated Petersen's concern would be moot if the court granted the motion and information about the Colusa County murder was never presented to the jury. The court, however, stated several times it was not going to rule on Blake's motion at that time.

The court suggested that it give the jury the

general nature of the proceedings and a brief, undetailed summary of the case against defendant and then allow the attorneys "briefly, to supplement" the summary. The prosecutor asked if there were "any areas that we shouldn't go into?" The only one the prosecutor could think of was the court had indicated it would be more appropriate to say some questions "arose" of defendant's competency, rather than that the defense made the motion. Mr. Petersen stated he could not think of any areas they should not go into for the jury. Mr. Blake stated they should not go into "any matters contained in the audio or video tapes, in which Mr. Stanley made comments about other offensets] for which he's not charged, for which he still remains subject to prosecution, which, again, is the basis of my motion to exclude such matter from the jury." The prosecutor pointed out there had been a lot of testimony during the penalty phase on the Colusa County murder and suggested "maybe one counsel could just touch on . . . it" without going into detail. Mr. Petersen requested a lengthy statement containing specific details on the circumstances of all three murders: the first degree killing of Cindy Rodgers, the specialcircumstance prior murder of Kathy Rhiley, and the penalty phase evidence of the Colusa County killing of Cheryl Renee Wright.

The court responded to Petersen's request by saying, "I don't feel that we should go into that detail at this point in the case." When Mr. Petersen expressed concern that it might emerge belatedly that some of the jurors had been exposed to publicity about one of the murders or were acquainted with the victims or witnesses, the court

stated: What the Court is going to do is to make a rather limited statement as to the nature of the case. And during the course of the jury voir dire, counsel will be given the opportunity to raise certain additional points if you feel that it's necessary. [Ed I will ask that such points be raised, though, as general statements and general inquiries. And not repeat all of the details to each individual juror."

When the court reconvened with the jury panel, the court gave a brief, undetailed summary of the nature of the case, without any indication of the nature of the special circumstances or the evidence in the penalty phase. Mr. Petersen then began a detailed discourse on the nature of the proceedings and the evidence against defendant at his trial, including the special circumstances. As he was giving the details of the penalty phase, he detoured into an explanation of the nature of competency and the position of attorneys in relation to their clients. The prosecutor objected twice on grounds Mr. Petersen was going beyond a simple summary of the nature of the case. Mr. Petersen then quickly concluded, without mentioning the Colusa County murder. Eleven jurors then were empaneled, during which time defense counsel exercised all their peremptory challenges.

Three days later, the court gave its brief summary of the nature of the case to a new panel of prospective jurors. Mr. Petersen then began his supplement to the court's summary. The prosecutor objected on grounds Petersen was getting into a speech. The court admonished Petersen that the purpose "at this point is simply to indicate for this

panel . . . the general nature of the case, and it is not intended as an opening statement." Mr. Petersen then asked the court to give the factual background of the case "because . . . [the prosecutor] is sensitive to certain things that [will] come out, and I would like . . . them to come out neutral through the Judge." "[T]here are things necessary that must be said," he stated, "in order to gauge impartiality." The prosecutor responded that he wanted the facts to come out also, and as far as he was concerned, "the Court can relate everything about the proceedings, everything." Mr. Petersen replied, "Then we're in unison."

The court declined to have counsel prepare a stipulated statement, because counsel was capable of stating the necessary additional facts. In response to the court's inquiry, Petersen stated it could take half an hour to explain the nature of the case. When reminded that the explanation had not taken that long during voir dire of the previous panel, Petersen responded that he had had "trouble with [the prosecutor's] objections" at that time. Mr. Blake stated that he joined Petersen's comments concerning the explanation of the case.

When the prosecutor was asked if he had anything to add to the court's summary, he stated, "I care to add something. I care to tell about the evidence in the penalty phase and what the special circumstances are." Asked by the court how much time that would take, the prosecutor responded, "Oh, probably five minutes, the evidence that was produced by the People." Neither defense counsel

objected or asked the court to limit the prosecutor's statement. Nevertheless, the prosecutor added: "I want to be sure that it's okay with Mr. Petersen because he knows the evidence which the People produced during the penalty phase in those particular areas. [ED If that's okay, then I'll relate that." Mr. Petersen then objected, but only on the grounds that because he had the burden to establish defendant's incompetence, he "would be the one that would make the opening statement." Admonished by the court that the prosecutor was making a factual summary, not an opening statement, Mr. Petersen made no further objection. The court then stated to the prosecutor, "[I]f you wish, you may proceed."

The prosecutor then proceeded to give a brief summary of the special circumstances and the penalty phase. After stating the nature of the three special circumstances, he turned to the penalty phase. "During the penalty phase," the prosecutor stated, "the People put on evidence to show Mr. Stanley was guilty of committing another murder in Colusa County." At that point defense counsel Blake objected and moved for a mistrial. Petersen joined in the motion.

In a discussion outside the presence of the jury, the court stated its belief they had an understanding "in the selection of the jury as to the first panel" that the Colusa County murder would be omitted and deferred until after defense counsel Blake's motion to exclude the evidence was heard. The prosecutor stated he had no such understanding; that although there was no mention of the Colusa

County murder to the first jury panel, he had thought Mr. Petersen was going to mention it, but when he leaned over and asked him, Petersen had said no. The prosecutor had not, however, felt bound by this "informal off the record" exchange. The court denied the motion for mistrial without prejudice to its renewal if the court subsequently granted Mr. Blake's motion to exclude any evidence of the Colusa County murder

As the foregoing demonstrates, in referring to the Colusa County murder the prosecutor did not violate any order of the court, either express or implicit. If the court had intended to order that the murder not be mentioned, it neglected to do so. There was no prosecutorial misconduct.

6. *Claims of Instructional Error*

Defendant contends the trial court improperly instructed the competency jury. Specifically, defendant argues the jury heard an incorrect definition of incompetency and an erroneous allocation of the burden of proof. As we shall explain, his contentions lack merit.

Just before they retired to deliberate, the trial court instructed the jurors on the issue of incompetency in the following terms, which had been proposed by defense counsel Neill: "In this proceeding you are to decide whether or not the defendant is mentally incompetent to be tried for a criminal offense. This proceeding is not in any sense a criminal proceeding, and the innocence or guilt of the defendant of the

criminal charges against him is not involved nor is the question of his legal insanity at the time of the offense involved. [¶] Penal Code section 1367 provides that: [¶] A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this proceeding if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Defendant now argues the foregoing instruction fails to satisfy the requirements of *Dusky v. United States* (1960) 362 U.S. 402, 402 [4 L.Ed.2d 824, 80 S.Ct. 788] *(Dusky).* In a per curiam opinion in that case, the high court observed it is not enough for competency that the defendant is oriented to time and place and has some recollection of events; rather, "the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *(Ibid.)*

It is true the language of section 1367 does not match, word for word, that of *Dusky.* But as the Court of Appeal noted in *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 177 [143 Cal.Rptr. 398], "To anyone but a hairsplitting semanticist, the two tests are identical."

Defendant complains the instruction given was deficient in not requiring the jury to find him able to

against him. Instead, it merely required he understand the nature of the criminal proceedings. The contention must fail, as defendant suggests no way in which the jury might have been misled. He further argues the instruction was deficient in not requiring the jury to find the defendant "'comprehends his own status and condition in reference to such proceeding' as required by *Dusky.*" A fair reading of the instruction, however, compels one to conclude the assertedly missing element is implicit. Moreover, preliminary instructions read to the jury at the outset of the competency phase included the phrase "comprehends his own status and condition in reference to such proceeding."[22] Finally, defendant contends in essence the instruction given was deficient because it used the word "rational" only once, rather than twice, as did the *Dusky* formulation. Because defendant does not explain the significance of this asserted deficiency, and because none appears, we reject the contention. That the jury, during deliberations, asked for a definition of "rationally assist" does not affect our analysis. Defendant fails to persuade us the court erred in giving the instruction based on section 1367.

Regarding the burden of proof, the trial court instructed the jury as follows: "The defendant is presumed to be mentally competent to stand trial and the one contending the defendant is mentally

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[22]Contrary to defendant's assertion, we find no substantive inconsistency between the preliminary and final instructions.

and the one contending the defendant is mentally incompetent has the burden of proving by a preponderance of the evidence that he is mentally competent to stand trial."

This instruction departed slightly from the standard instruction, which provides that "[t]he defendant . . . has the burden of proving by a preponderance of the evidence that he is mentally incompetent." While the parties were discussing competency phase jury instructions, defense counsel argued it could not be said *defendant* bore the burden of proving his incompetency, since his position was that he was competent. After negotiations concerning the wording of the instruction, the parties agreed on the version set forth above. Later, in argument, the prosecutor elaborated on the question of burdens, stating the side claiming defendant was incompetent had the burden of proof and noting, "I assume that's represented by Mr. Petersen."

Defendant contends that under *People v. Skeirik* (1991) 229 CalApp.3d 444 [280 Cal.Rptr. 175] the trial court erred in assigning a burden of proof. The *Skeirik* court cautioned trial judges not to rely uncritically on the standard instruction regarding the burden of proving incompetency, reasoning the language of the instruction assumes it will always be the defense that is seeking the finding of incompetency. *(Id.* at p. 459; see CALJIC No. 4.10.) When the prosecution, or the trial court on its own motion, is presenting evidence of incompetency, *Skeirik* teaches that the standard instruction should be modified to inform the jury of the legal standard

to apply to the evidence, without allocating the burden of proof to one party or the other. *(Skeirik, supra,* 229 Cal.App.3d at p. 460.) Defendant contends the trial court in his case should have declined to instruct the jury that either side bore the burden of proof.

As the People suggest, the *Skeirik* court was primarily concerned with avoiding jury confusion in cases where the evidence for incompetency is presented by someone other than the defendant. Although the trial court here did not anticipate the exact solution proposed in *Skeirik,* we conclude its modification to the standard instruction—assigning the burden of proof to "the one contending the defendant is mentally incompetent"—adequately apprised the jury how to determine the issue in dispute. Defendant was not forced to shoulder a burden not properly his. Throughout the competency phase it was clear Attorney Petersen was the one presenting evidence of incompetency. Defendant fails to show how the jury might have been misled.

Defendant also urges the requirements of due process forbid imposing on criminal defendants the burden of proving their own incompetency. This argument was rejected in *Medina v. California* (1992) 505 U.S. ___, ___ [120 L.Ed.2d 353, 368, 112 S.Ct. 2572, 2581]. Defendant argues *Medina* is not controlling because, unlike this case, *Medina* did not involve a situation where the trial court appointed counsel to represent the defendant's position that he was competent to stand trial, even as defense counsel presented evidence of incompetency. Defendant's argument hinges on his

claim, which we have already rejected, that the appointment of Attorney Blake created a conflict that vitiated Attorney Petersen's presentation of the case for defendant's incompetency. We see no valid distinction in this respect between *Medina* and this case.

As we have found no error in the conduct of the competency trial, it is unnecessary to address defendant's contention that retrospective evaluation of competency on appeal is improper under California law.

D. *Penalty Phase*

1. *Admission of Facts Underlying Defendant's Prior Murder Conviction*

Defendant contends the court erred prejudicially in permitting introducetion in evidence of the facts and circumstances underlying his prior conviction for the second degree murder of his second wife, Kathy. He maintains that when, pursuant to section 190.3, a prior felony conviction involving a crime of violence is introduced in aggravation of sentence, only the fact of the conviction is admissible, not the details of the offense.[23]

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[23]Defendant cites the first paragraph of section 190.3, which provides in pertinent part: "In the proceedings on the question of penalty, evidence may be presented by . . . the people . . . as to any matter relevant to aggravation, . . . including . . . the

We have repeatedly rejected the identical contention. (E.g., *People v. Visciotti* (1992) 2 Cal.4th 1, 71 [5 Cal.Rptr.2d 495, 825 P.2d 388]; *People v.Karis* (1988) 46 Cal.3d 612, 639-640 [250 Cal.Rptr. 659, 758 P.2d 1189]; *People v. Melton* (1988) 44 Cal.3d 713, 754 [244 Cal.Rptr. 867, 750 P.2d 741]; *People v. Gates* (1987) 43 Cal.3d 1168, 1203 [240 Cal.Rptr. 666, 743 P.2d 301] *(Gates).)* As we explained in *Gates, supra,* "When dealing with violent conduct it is not the *fact* of conviction which is probative in the penalty phase, but rather the *conduct* of the defendant which gave rise to the offense. Defendant's contention might have had merit had the convictions involved *nonviolent* conduct, since the admission of such evidence is strictly limited by subdivision (c) of section 190.3. But the convictions here involved *violent* conduct and were thus admissible pursuant to subdivision (b) of section 190.3, which permits the introduction of all evidence of violent crimes and does not require a conviction." (43 Cal.3d at p. 1203, italics in original.)

Defendant argues additionally that permitting evidence of the circumstances surrounding the prior

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nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, [and] the presence . . . of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence .... "

conviction, including evidence suggesting defendant had premeditated and deliberated that murder, allowed the prosecutor to imply, and the jury to infer, that the offense actually was of the first degree.[24] Because the jury's verdict in 1975 of second degree murder impliedly acquitted defendant of first degree murder *(Green v. United States* (1957) 355 U.S. 184, 190-191 [2 L.Ed.2d 199, 205-206, 78 S.Ct. 221]; *Stone v. Supenor Court* (1982) 31 Cal.3d 503, 511 [183 Cal.Rptr. 647, 646 P.2d 809], and cases cited at fn. 5), introduction of evidence suggesting defendant in fact had premeditated and deliberated Kathy Stanley's murder, he asserts, violated his constitutional protection against double jeopardy (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 15) and the

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[24]24Defendant points to the testimony of his first wife that. in a telephone conversation with defendant the day after his arrest for his second wife Kathy's murder, during which he threatened to "take care of [her] like he did Kathy," he indicated he "was going to pretend that he was mentally ill and knew how to get away with that with the psychiatrist, and that he would get out in two or three years." From this the prosecutor argued: "So here you have a man who has been arrested. He is already planning to use or manipulate psychiatrists so he could get out in two or three years. And lo and behold he almost makes it—four and a half years for the second degree murder of his second wife, Kathleen."

express provisions of section 190.3.[25]

The record does not support defendant's contention. The prosecution neither presented evidence nor argued that defendant was actually guilty of first degree murder of his second wife. The prosecutorial argument cited by defendant (see fn. 24, *ante)* was made in context of arguing that defendant's threats to his first wife were not "empty words." The court instructed the jury only on the elements of second degree murder in relation to defendant's conviction for killing Kathy and, on agreement of the parties to ensure the jury was not misled, the court specifically told the jury deliberation and premeditation were not elements of the offense. (Cf. *People v. Melton, supra,* 44 Cal.3d at pp. 754-755.)

Nor, contrary to defendant's argument, did presentation of the facts and circumstances of the second degree murder conviction require defendant to"run the gauntlet" a second time in violation of double jeopardy principles (see *People v. Visciotti, supra,* 2 Cal.4th at p. 71; *Ashe v. Swenson* (1970) 397 U.S. 436, 446 [25 L.Ed.2d 469, 476-477, 90 S.Ct.1189]). As we havepreviously stated: "[O]ne is not placed 'twice in jeopardy for the same offense' when the details of misconduct which has already

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[25]Section 190.3, third paragraph, provides in pertinent part: "However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted."

resulted in conviction and punishment . . . are presented in a later proceeding on the separate issue of the appropriate penalty for a *subsequent* offense. [Citation.] Such a procedure is proper, in our view, even if defendant must thereby endure the 'ordeal' of a second 'trial.' [Citation.] The capital sentencing jury must have the most detailed relevant information about the individual offender. It would be anomalous if jurors could hear the 'gory details' of prior violent crimes with which defendant *had never been charged,* but could consider only cold abstracts of conviction in cases where defendant had been prosecuted successfully." *(People v. Melton, supra,* 44 Cal.3d at p 756, fn. 17, italics in original; see *People v. Poggi* (1988) 45 Cal.3d 306, 331 [246 Cal.Rptr. 886, 753 P.2d 1082].)

Defendant urges *Taylor v. United States* (1990) 495 U.S. 575 [109 L.Ed.2d 607, 110 S.Ct. 2143] *(Taylor)* requires a contrary conclusion. There the high court held that a federal statute, providing for a sentence enhancement in the event a defendant had suffered three prior convictions of certain felonies, as generically listed in the federal statute, precluded the sentencing court from looking beyond the terms of a state statute defining burglary, or the charging document and the jury instructions, to determine whether the defendant's prior conviction in state court met the federal statutory requirements of "generic" burglary. *(Id.* at pp. 600-602 [109 L.Ed.2d 628-629].) Plainly, however, the high court in *Taylor* was interpreting a federal statute, not articulating a federal constitutional standard. *Taylor* therefore does not govern this case. *(People v. Wader* (1993) 5 Cal.4th 610, 656, fn. 8 [20 Cal.Rptr.2d 788, 854

P.2d 80]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1243, fn. 14 [14 Cal.Rptr.2d 702, 842 P.2d 1].)

2. *Dual Use of Prior Murder Conviction*

Relying on *People v. Harris* (1984) 36 Cal.3d 36 [201 Cal.Rptr. 782, 679 P.2d 433], defendant contends the court erred in instructing the jury it could consider his prior murder conviction as both a special circumstance (§ 190.3, factor (a)) and a prior felony conviction (§ 190.3, factor (c)).

This court's decision in *People v. Melton, supra*, 44 Cal.3d 713, undermines the premise of defendant's argument. As we there stated: "We agree that an individual criminal act cannot be counted twice in aggravationfor *the same purpose.* However, we see no constitutional obstacle to separate consideration of properly distinct aspects of the penalty determination, even when those aspects happen to coexist in a single incident." *(Id.* at pp. 766765, italics in original.)

The purpose of the prior-murder-conviction special circumstance is "'to circumscribe, as the Eighth Amendment requires [citation], the classes of persons who may properly be subject to the death penalty....' ... And the purpose of factor (c) is to show the capital offense was the culmination of the defendant's habitual criminality—that it was undeterred by the community's previous criminal sanctions. [Citations.] Given these distinct purposes, there is no constitutional impediment to consideration of a defendant's prior-murder conviction under factors (a) . . . and (c)." *(People v.*

Malone (1988) 47 Cal.3d 1, 46 [252 Cal.Rptr. 525, 762 P.2d 1249]; cf. *Lowenfield v. Phelps* (1988) 484 U.S. 231, 245-246 [98 L.Ed.2d 568, 582583, 108 S.Ct. 546].) The trial court's instruction was not error.

3. *Evidence of Uncharged Offenses*

Pursuant to section 190.3, factor (b), permitting evidence of prior criminal activity involving violence or threats of violence, the prosecutor introduced evidence of numerous prior acts of misconduct by defendant.[26] Defendant asserts the introduction of

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[26]These acts were as follows: (I) murder (§ 187) the murder of Cheryl Renee Wright on or about August 10, 1980, in Colusa County; (2) arson (§ 451)-the arson of Cindy Rogers's automobile on or about July 17, 1980, in Trinity County; (3) rape (§ 261)-the rape of P. in the spring of 1974; (4) attempted rape (§§ 261/264)-the attempted rape of P. in 1974; (5) breach of the peace (§ 4159(a) threatening violence to the person of Jim Rhiley in the summer of 1969, (b) challenging Robert Downing to fight and threatening to burn Downing's camper in the fall of 1971, and (c) threatening to kill the wife of defendant's deceased brother in 1970; (6) brandishing a deadly weapon (§ 417Hfiring a shotgun at a neighbor in October or November of 1965; (7) vandalism (§590)-malicious damage to the vehicle driven by P. in the summer of 1969; (8) annoying telephone calls (§ 653m) (a) telephone threats to the life of Linda Faith on January 15, 1975, (b) telephone

this evidence deprived him of due process and a fair trial.

Defendant first argues adjudication of the uncharged offenses by the same jury that had found him guilty of first degree murder with the special circumstance of a prior murder conviction denied him an impartial decisionmaker. Defendant recognizes we rejected this contention in *People v.Balderas* (1985) 41 Cal.3d 144, 204 [222 Cal.Rptr. 184, 711 P.2d 480] and *People v. Allen* (1986) 42 Cal.3d 1222, 1284 [232 Cal.Rptr. 849, 729 P.2d 115]. He urges that we distinguish those cases because in neither did the unadjudicated conduct, as here, consist of a crime—the first degree murder of another female the day before the commission of the capital murder—so closely connected to the capital murder itself. In these circumstances, he maintains, the danger of jury predisposition to find he committed the uncharged murder required a separate penalty jury.

We reject the attempted distinction. Our death penalty statute expressly provides a capital defendant's prior violent conduct is relevant to the penalty determination. That the conduct is closely similar to the capital offense hardly makes it less relevant. "[D]ue process does not preclude the consideration of this type of evidence by a penalty

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threats to the life and property of Claudia Ameral in July 1970, and (c) telephone threats of violence to the person and family of Barbara Gwiazdon in October 1969.

jury which has found the defendant guilty of murder." *(People v. Balderas, supra,* 41 Cal.3d at p. 204.) Further, because a new jury would be entitled to hear the circumstances of the capital offense and any special circumstance found true at the guilt trial (§ 190.3, factor (a)), we have determined that "the strong legislative preference for a unitary jury outweighs any 'supposed disadvantage' todefendant in the single-jury process. [Citations.]" *(Balderas, supra,* I Cal.3d at p. 204.)

Defendant alleges the introduction of evidence concerning unadjudicated crimes that occurred between 1965 and 1975 (all but the Colusa County murder and the arson of Cindy Rogers's car, see fn. 26, *ante)* required him to defend against stale acts, in violation of his constitutional rights to due process and a speedy trial and the applicable statutes of limitations.

We have previously rejected the claim that the running of the statute of limitations precludes consideration of time-barred felonious conduct involving violence or the threat of violence as an aggravating factor. *(People v. DeSantis* (1992) 2 Cal.4th 1198, 1252 [9 Cal.Rptr.2d 628, 831 P.2d 1210]; *People v. Robertson* (1989) 48 Cal.3d 18, 43 [255 Cal.Rptr. 631, 767 P.2d 1109]; *People v. Jennings* (1988) 46 Cal.3d 963, 982 [251 Cal.Rptr. 278, 760 P.2d 475].)

Nor is the penalty phase of trial, as defendant suggests, the equivalent of a criminal prosecution for purposes of due process and speedy trial analysis. Evidence of prior unadjudicated violent

conduct is admitted not to impose punishment for that conduct, but rather, in part, to give the jury in the capital case "a true picture of the defendant's history since there is no temporal limitation on evidence in mitigation offered by the defendant." *(People v. Jennings, supra,* 46 Cal.3d at p. 982.) As this court noted in *People v. Balderas, supra,* 41 Cal.3d 144, 205, footnote 32, the "penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes. Prior violent criminality is obviously relevant in this regard; the reasonable doubt standard ensures reliability; and the evidence is thus not improperly prejudicial or unfair." (Accord, *People v. Jennings, supra,* 46 Cal.3d at pp. 980-982.)

Defendant made no objection below nor does he attempt on appeal to show any specific prejudice from admission of the allegedly stale evidence. Any vagueness, as he claims, in the testimony of the witnesses against him concerning the dates of the alleged acts, was a proper subject for cross-examination. Defendant fails to demonstrate unfairness in the proceeding.

Finally, defendant argues the trial court erred in not instructing the jury in the penalty phase that it must be unanimous in a finding that other crimes occurred. We rejected this contention in *People v. Ghent, supra,* 43 Cal.3d at pages 773-774. (Accord, *People v. Frierson* (1991) 53 Cal.3d 730, 750 [280 Cal.Rptr. 440, 808 P.2d 1197].)

4. *Admission of Nonstatutory Aggravaring Evidence*

Relying on *People v. Boyd* (1985) 38 Cal.3d 762 [215 Cal.Rptr. 1, 700 P.2d 782] *(Boyd),* defendant contends the admission of evidence of certain allegedly noncriminal or nonviolent acts, and of incidents involving violence or threats of violence to property only, constituted prejudicial error.[27]

In *Boyd, supra,* we determined that under the 1978 death penalty law,"Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation." (38 Cal.3d at p. 774.) We

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[27]Defendant challenges admission of the following incidents: (I) arson (§451) of Cindy Rogers's automobile; (2) breaches of the peace (§ 415) by (a) threatening violence to Jim Rhiley, (b) challenging Robert Downing to fight and threatening to bum Downing's camper, and (c) threatening to kill the wife of defendant's deceased brother, (3) vandalism (§ 594) by malicious damage to P.'s vehicle; and (4) annoying telephone calls (§ 653m) by (a) telephone threats to the life of Linda Faith, (b) telephone threats to the life and property of Claudia Ameral, and (c) telephone threats of violence to the person and family of Barbara Gwiazdon.

Defendant acknowledges the arson of Cindy's automobile was properly admitted at the guilt phase (on the issue of identity), but maintains it was improperly considered in aggravation of penalty.

further concluded evidence of violent injury or the threat of violent injury to property is not admissible, as "not of a type which should influence a life or death decision." *(Id.* at p. 776.)

We first observe defendant made no objection to the admission of any of the other-crimes evidence on the ground the evidence did not relate to one of the statutory factors. (See *People v. Coleman* (1988) 46 Cal.3d 749, 787 [251 Cal.Rptr. 83, 759 P.2d 1260]; *People v. Poggi, supra,* 45 Cal.3d at p. 331.) The argument may therefore be deemed waived. *(People v. Poggi, supra,* 45 Cal.3d at p. 331.)

Boyd, moreover, is distinguishable. Unlike the act involving property there at issue—the "presumably violent" removal of an air vent's metal grating in an escape attempt (38 Cal.3d at p. 776)—defendant's arson of Cindy's car was an integral part of his attempts to frighten and control her, attempts that commenced with his rape and assault of her on July 16, 1980, that continued with his arson of her house on July 18 and his arson of her car on July 20, and that culminated in his murder of her on August 11. Viewed in this context, the car arson clearly involved an implied threat of violence against a person, as required by *Boyd, supra,* 38 Cal.3d 762, for admission under section 190.3, factor (b). Defendant's threat to burn Downing's camper, made in the context of his effort to get Downing to fight, likewise may be viewed as an implied threat of violence against Downing and thus admissible under factor (b).

Evidence of the violations of sections 415 and 653m also was admissible under section 190.3, factor (b). In *Boyd, supra,* 38 Cal.3d 762, this court suggested the threats of violence there at issue would have been admissible had the prosecution proved the elements of a criminal offense. (38 Cal.3d at pp. 777-778.) Here the jury was instructed on the elements of sections 415[28] and 653m[29], and was further instructed to consider the evidence of the alleged threats only if they found beyond a reasonable doubt that defendant had committed the offenses described. That the offenses do not necessarily require acts or threats of violence is immaterial. Section 190.3, factor (b) permits evidence of any offense that in fact *"involved* the use or attempted use of force or violence or the express or implied threat to use force or violence." (Italics added; see *People v. Grant* (1988) 45

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[28]The court instructed the jury in pertinent part as follows on breach of the peace: "Every person who unlawfully fights, challenges another person to fight in a public place, [or] who in a public place directs at one or more persons offensive words which are inherently likely to provoke an immediate violent reacdon, is guilty of a misdemeanor."

[29]The court instructed the jury in peninent part as follows on annoying telephone calls: "Every person who with the intent to annoy, telephones another and addresses to or about such other person any threat to inflict injury to the person or the property of the person

Cal.3d. 829, 850-851 [248 Cal.Rptr. 444, 755 P.2d 894] [possessing a deadly weapon]; cf. *Boyd, supra,* 38 Cal.3d at p. 777 [inciting to riot].) Defendant's offenses clearly involved threats of violence.

Pursuant to the foregoing analysis, all the other-crimes evidence, except the vandalism to P.'s car, was properly admitted. But even assuming admission of the evidence was error, it clearly was nonprejudicial. As properly admitted evidence in aggravation the jury had before it the circumstances of the instant offense—a cold-blooded killing, from a position of hiding, committed in the presence of the victim's parents and 10-year-old child; the 3 special circumstances of prior conviction of murder, murder by lying in wait, and murder for the purpose of killing a witness; defendant's prior conviction of the second degree murder of his wife Kathy Stanley; his murder of Cheryl Renee Wright the day before Cindy's murder; his rape of P.; the attempted rape of P.; and his brandishing a deadly weapon by firing a shotgun at a neighbor. From this evidence the jury would have had to infer that defendant had engaged in a pattern of exceptionally violent behavior over an extended period of time and that he had failed to respond to the rehabilitative efforts of the criminal justice system. Admission of the additional evidence could not have made a difference. (See *People v. Burton* (1989) 48 Cal.3d 843, 863-864 [258 Cal.Rptr. 184, 771 P.2d 1270].) Defendant's contention his trial counsel rendered ineffective assistance by failing to object to the evidence accordingly also must fail for want of prejudice. *(People v. Zapien* (1993) 4 Cal.4th 929, 981 [17 Cal.Rptr.2d 122, 846 P.2d 704].)

5. *Skipper Error (Skipper v. South Carolina (1986) 476 U.S. 1 [90L.Ed.2d 1,106 S.Ct. 1669]*

Citing *Lockett v. Ohio* (1978) 438 U.S. 586 [57 L.Ed.2d 973, 98 S.Ct. 2954] and *Eddings v. Oklahoma* (1982) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869] defendant contends the court erred in restricting inquiry into whether his family opposed his execution. The issue arose prior to the presentation of certain defense witnesses, when the prosecution asked for an offer of proof as to the relevancy of the testimony of certain members of defendant's family. The prosecutor stated he was making a motion *in limine* to exclude the testimony unless the witnesses had something relevant under the criteria of section 190.3, factors (a) through (k). As an example of a question he considered irrelevant, the prosecutor cited asking defendant's mother "whether she wanted to see him executed." Defense counsel suggested Mrs. Stanley's answer would "indicate something about [defendant's] character and the nature of their relationship." The court stated the question did not appear to be probative of any issue related to the statutory factors and ordered that the question not be asked, but without prejudice to reconsideration of the issue if "any counsel believes that it would be relevant . . . " At no time did defense counsel pursue the matter.[30]

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[30]As the Attorney General argues, the record suggests the idea for tne question originated with the prosecution, not the defense. That the defense had not actually planned to ask the question is suggested

In *Lockett v. Ohio, supra,* 438 U.S. 586, and *Eddings v. Oklahoma, supra,* 455 U.S. 104, the United States Supreme Court held that the Eighth and Fourteenth Amendments require that the "sentencing jury . . . 'not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' [Citations.]" *(People v. Easley* (1983) 34 Cal.3d 858, 877-878 [196 Cal.Rptr. 309, 671 P.2d 813], italics omitted.) Here the jury was not precluded from considering such evidence. Defendant's mother testified fully to his background as a youth, his early commitment to the Youth Authority, the ridicule he suffered because of a physical defect requiring corrective surgery, his love for his children and her love for defendant. His sister testified that after defendant's parole from prison in 1979 she observed him encourage his son in sports and express his love for his children. His brother-in-law likewise testified that defendant had expressed love for his children, that defendant had been a pleasant companion on a trip they had taken together, and that he loved him very much. Each of defendant's three children testified to their love for him and his love for them.

From the foregoing testimony the jury would have inferred the obvious that defendant's family did not want him to be executed. Assuming, without

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by tne prosecutor's having first stated the question and also by the failure of the defense to accept the court's invitation to take the matter up later.

deciding, the court's ruling was error (see *People v. Fierro, supra,* 1 Cal.4th at p. 241; but see *Robinson v. Maynard* (lOth Cir. 1987) 829 F.2d 1501, 1505, cert. denied 502 U.S. _ [116 L.Ed.2d 463, 112 S.Ct. 445]), it clearly was harmless beyond a reasonable doubt. *(Chaprnan v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]; cf. *People v. McLain (1988)* 46 Cal.3d 97, 109 [249 Cal.Rptr. 630, 757 P.2d 569].)

6. *Prosecutorial Misconduct*

Defendant asserts several instances of error in the prosecutor's closing argument. We discuss his claims in turn, and conclude defendant has not shown error.

a. *Caldwell error*

Citing this court's decisions in *People v. Milner* (1988) 45 Cal.3d 227 [246 Cal.Rptr. 713, 753 P.2d 669] *(Milner)* and *People v. Farmer* (1989) 47 Cal.3d 888 [254 Cal.Rptr. 508, 765 P.2d 940] (*Farmer*), defendant contends ihs sentence must be reversed under the Eighth Amendment principles articulated in *Caldwell v. Mississippi* (1985) 472 U.S. 320 [86 L.Ed.2d 231, 105 S.Ct. 2633] (*Caldwell*). *Caldwell* stands for hte proposition that a detah sentence may not rest on a determination made by a sentencer who has been affirmatively mislead to believe the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere. (*Caldwell, supra*, 472 U.S. at pp. 328-329 {86 L.Ed. at p. 240]; see also *Romano v. Oaklahoma* (1994) 512 U.S. ___, ___ [129 L.Ed.2d

1, 11, 114 S.Ct. 2004].) "[S]tate-inducced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court" thsu violate the Eight Amendment and invalidate a death sentence returned under their influence. (*Caldwell, supra*, 472 U.S. at p. 330 [86 L.Ed.2d at p. 240].) so also does the suggestion that "the law" in the abstract, and not the jurors themselves, determines whether the defendant receives the death penalty. Prosecutorial argument of the latter sort, coupled with a potentially misleading instruction on the jury's sentencing responsibility, caused us to reverse the death sentences imposed in the cases of *Milner, supra*, 45 Cal.3d 227 and *Farmer, supra*, 47 Cal.3d 888. The prosecutor in *Milner* told the jurors, in summation, essentially that they did not bear personal responsibility for imposig hte death penalty, they were notreqruies to cnosider their personal feelings, and "the law" would "protect" them if they avoided doing so. Evaluating the whole record, we concluded thye jury was mislead as to its sentencing discretion and responsibility; consequently, we reversed the sentence of death. (*Milner, supra*, 45 Cal.3d at p. 257.) Similarily, in *Farmer* the prosecutor during his argument to the jury, declared, "Whether or not Mr. Farmer should live or die was decided by the voters of this state when they passed this [death penalty] law, when they set the criteria. They decided who lives and who dies. You decide, does aggravating outweigh mitigating. This is your job. That is all you decide. the law does the rest . . . You do not decide life or death. The law does that." (47 Cal.3d at p. 929.) We concluded this erroneous statement, among others contained in the prosecutor's cloosig argument, required reversal

of the death sentence. (*Farmer, supra*, 47 Cal.3d at pp. 924-931.)

Defendant cites the following portion of the prosecutor's closing argument: "[A]t least 50 or 60 times duirng Mr. Neil's argument,probably 20 times during Mr. Petersen's argument, they said, 'Are you going to kill Mr. Stanley, are you going to kill him.' Over and over again. Are you going to kill him. Are you going to out the gun to his head. Are you going to pull the trigger. Are you going to kill him. What is the defense is trying to do. What are they trying to do? Mr. Stanley is the murderer. The defense wants the jury, you ladies nad gentlemen, who have come here, and given of your time, they want you to feel like the murderer. They want you to turn the table, and put you on the defensive. You are the murderers. If you do what the facts say, if you do what the law says that you should do, if you reach a just result in this case, you then are the murderers. Is that an honest argument? Is that a valid argument? Is that anywhere in these factors? Strictly pandering, playing to some emotion, to turn the tables. And I daresay, ladies and gentlemen, if youare murderers, or killers for returning a verdict of death, then how about the people that are on death row in California, a hundred plus, are the juries who convicted them, are those jurors made up of killers? Every time the death penalty has been on the ballot, 68 - 70 percent of the people of this state have voted in favor of it. That is the law. And if you are killers, then 68 - 70 percent of the people in this state are killers in the same regard. If you are killers then the legislature of this state, duly elected representatives through out the various counties,

and districts in this state, those people who have enacted the law of capital punishment, the legislature, they are murderers too, they are killers. The District Attorneys, the prosecutors, they are killers too. And the judge who has to review the death cases, and make determinations, and trial judges, they affirm it, if they affirm it, they are killers too. And the Courts of Appeal in this state, Supreme Court, if they affirm the death penalty cases, under this law, those judges, or justices of the Supreme Court, if they affirm, I guess they are killers too. And if the governor fails to commute a sentence in a death penalty case, I suppose the governor is a killer too." The trial court on its own motion directed the jury to disregard the remark about the Governor.

By failing to object to the prosecutor's comments, defendant failed to preserve the claim of *Caldwell* error. If we were to reach the merits of his argument, we would conclude the jury was not misled to believe the responsibility for determining defendant's sentence lay elsewhere. We do not read the prosecutor's statements as suggesting to the jury that some other agency, such as a reviewing court, was responsible for the sentence to be meted out to defendant. Rather, the prosecutor's remarks were designed to refute the defense's implication that, if the jury voted for death, it would be on the same moral level as a murderer.

Defendant further characterizes other aspects of the prosecutor's closing argument as suggesting the jury could essentially "remove itself' from the decision making process and mechanically weigh

aggravating and mitigating factors. We do not so read the argument defendant cites. In our view it falls well within the bounds of propriety.

Defendant notes the prosecutor urged the jury to "weigh the matters that had been presented in aggravation by the People which indicate that death is an appropriate verdict" against "the matters in mitigation, the defense presented . . . and if the aggravation presented outweighs the mitigation, then your verdict stall be one of death." (Italics added.) However, contrary to defendant's claim, the prosecutor's argument did not impermissibly lessen the jurors' sense of responsibility to determine the sentence, but instead paraphrased the relevant portion of section 190.3 in the context of an argument stressing the weighing function the jurors were charged to perform. (See *People v. Howard, supra* 1 Cal.4th at p. 1187.) We are mindful of our words of caution in *People v. Brown* (1985) 40 Cal.3d 512, 538-541 [220 Cal.Rptr. 637, 709 P.2d 440], that the instruction based on this statutory language, in isolation, has the potential to mislead the jury about its sentencing discretion. Based on our review of the record as a whole, however, we see no reasonable likelihood *(People v. Clair* (1992) 2 Cal.4th 629, 663 [7 Cal.Rptr.2d 564, 828 P.2d 705]) the jury was so misled in this case.

Defendant also contends the jury's penalty determination is unsupported by substantial evidence. He fails to cite any authority, legal or factual, for that contention, and we therefore are not obliged to address it. Nonetheless, we have reviewed the record and conclude the evidence,

outlined above, amply supports the jury's finding that death is the appropriate penalty in this case.

b. *Griffin Error*

In summarizing the penalty phase evidence, the prosecutor repeatedly referred to the absence of any defense challenge to aggravating evidence of defendant's violent behavior.[31] Defendant contends

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[31]Relevant portions of the prosecutor's argument are as follows: ". . .I laid out, and went through each and every one of the matters in aggravation that this jury should consider. And these are the matters that you are to put on that scale to balance it. And I waited and I waited during the defense argument for them to pull out their mitigation that the law says that you can consider to put on their scale. And I waited and I waited and I waited. and I found little, if any, which they brought forth. But you know, that is not surprising. It is not their fault that they couldn't do it. It is not their fault that they had to make an emotional appeal to this jury. But that is what they had. That is all they had. That is all that was left. Because if this jury follows the law, and considers the circumstances in aggravation, and those couple perhaps in mitigation that has been offered by the defense, this isn't even a close decision, if you follow the law. It is not close. It is one sided. So the defense had to resort to something other than the law, something other than the facts to try to get the result which they

the prosecutor's comments drew the jury's attention to the fact he did not testify, in violation of the rule declared in *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229]. As we have noted, "Prosecutorial comment which draws

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wanted for their client. And the aggravation evidence that the People put on . . . went unchallenged by the defense. You know, that just went unchallenged, unquestioned. I mean, there was no challenge to the murder of Cheryl Renee Wright. There was no challenge involving the rape, and attempted rape of [P.]. There was no challenge to the threats of Jim Rhiley. There was no challenge to the violent words to Downing. There was no challenge to the fact that the Defendant threatened to kill his deceased wife's brother. There was no challenge to the threats of, 'I'll smash your face, I'll blow up your house,' and so on that were made over a period of time to Claudia Ameral. There was no challenge about the time that the Defendant fired the shotgun at his neighbor in 1965. There was no challenge about the vandalism the smashing of the car. There was no challenge about the threats to the life of a first wife, Linda Faith, that, 'I will take care of you like I did Kathy,' there was no challenge to the threats that were made to Barbara Gwiazdon, and her family. None whatsoever about going to get her, her crippled husband, and her children on the way home from school. There was no challenge whatsoever to any of those. And those matters go on the scale, and these are matters that this jury can consider."

the rule declared in *Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229]. As we have noted, "Prosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify, and which implies that the jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional rights." *(People v. Murtlshaw (1981)* 29 Cal.3d 733, 757 [175 Cal.Rptr. 738, 631 P.2d 446].)

Defendant's claim fails at the threshold, as he failed to preserve any claim of error by specifically and contemporaneously objecting at trial, and no reason appears why an admonition, if requested, would not have remedied any improper effect of the remark. *(People v. Noguera, supra,* 4 Cal.4th 599, 638.) Were we to reach the claim's substance, we would find it lacking in merit. Because nothing suggests only defendant's testimony was capable of "challenging" the aggravating evidence, it cannot be said the prosecutor's summation served to point a finger at defendant's failure to take the stand. Rather, it amounted to fair comment on the state of the evidence.

c. *Reference to Defendant's Prior Murder Conviction*

Defendant contends the prosecutor engaged in misconduct in the following reference to his 1975 conviction for the murder ofKathy Stanley. "[Defendant shortly after his alTest on the prior murder charge] indicated that he was going to pretend that he was mentally ill and knew how to

get away with that with the psychiatrists. And that he would get out in two or three years.... [¶] So here you have a man that has been arreisted. He is already planning to use or manipulate psychiatrists so he could get out in two or three years. And lo and behold he almost makes it—four and a half years for the second degree murder of his second wife, Kathleen."

This argument, defendant contends, implied his prior murder was actually of the first degree, when the jury in that case found it to be of the second degree, and suggested the jury in the present case should correct that injustice by "overcompensating" in the penalty decision at hand. He likens the prosecutor's argument in this respect to that disapproved in *People v. Haskett* (1982) 30 Cal.3d 841, 867 [180 Cal.Rptr. 640, 640 P.2d 776] *(Hasken)*. In *Haskett,* the prosecutor, during penalty phase argument, repeatedly suggested that by failing to convict the defendant of rape and robbery during the guilt phase, jurors had failed to follow the law, and invited them to correct their "wrong decision" in the penalty phase. *(Id. at p.* 864.) We strongly disapproved the prosecutor's argument, calling it an impermissible attempt to reopen the process of adjudication. *(Id.* at p. 866.)

Defendant failed to preserve this argument by a timely and specific objection at trial, and no reason appears why an admonition, if requested, would not have remedied the effect of the remarks. *(People v. Noguera, supra,* 4 Cal.4th at p. 638.) Even had the point not been waived, the attempted comparison of this case to *Haskett* fails. We find nothing in the

cited comments resembling a suggestion that the murder of Kathy Stanley was actually of the first degree, or that the jury in the present case should right the prior jury's wrong decision by voting for death. Rather, the prosecutor's comments were permissibly designed to suggest, based on the evidence in the record, that defendant was capable of manipulating psychiatrists such as Dr. Axelrad.

d. *Comment on Defendant's Age*

Defendant next contends the prosecutor engaged in misconduct by arguing for a death verdict based on defendant's age at the time of the crime. Again, the point is waived for failure to make a timely and specific objection below. *(People v. Noguera, supra,* 4 Cal.4th at p. 638.) Were it not, we would find no misconduct warranting reversal. We have previously held age, as used in section 190.3, factor (i), to be neither an aggravating nor a mitigating factor in and of itself, but rather a "metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *(People v. Lucky* (1988) 45 Cal.3d 259, 302 [247 Cal.Rptr. 1, 753 P.2d 1052].) Consequently, either counsel may argue age-related inferences in any case. *(Ibid.)* The prosecutor's rebuttal argument that defendant's age (35) could be considered a circumstance in aggravation because it signified he "kn[ew] about life. He kn[ew] what to expect of it. He kn[ew] what the rules of society are. He kn[ew] murder is wrong" merely asked the jury to infer defendant's age and attendant experience in life rendered him more culpable than a "young kid" who

have affected the jury's verdict. *(People v. Allen, supra,* 42 Cal.3d at p. 1284.)

e. *Sympathy for Victims*

Defendant contends the prosecutor engaged in misconduct by asking the jury to exercise sympathy for the victims and their families in determining the penalty.[32] He contends such an argument injects an

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[32]The prosecutor argued as follows: "What about other people, other family members, others—not sympathy or pity for Mr. Stanley. And we will go into that a little later.
"And it is not just Mr. Stanley that has emotions, not Mr. Stanley's family that has emotions. But there are other people that have emotions that are concerned with this case. They are those people that are the parents of Cindy Rogers Stanley—[objection by defense; overruled] [¶] There are those people that are the parents of Cheryl Renee Wright, Jim and Pat Rhiley, the parents of Kathleen Stanley—these people also have feelings. And of course I represent the People. But I think to a certain extent, I represent the interest, you know, of the victims, I mean, they aren't here . . . [y]ou can't see Kathleen. You can't see Cheryl Renee. You can't see Cindy. They aren't here. They can't come into the courtroom. They can't, as such, be a part of the proceedings. [¶] I guess the closest that I can do by bringing them into the courtroom is to show you their photos. I know really of no other way to do it so

impermissibly arbitrary element into the penalty decision and risks verdicts based on furyand rashness rather than reasoned consideration. The United States Supreme Court and this court have upheld "victim impact" evidence and arguments generally against constitutional and statutory challenge. *(Payne v. Tennessee*(1991) 501 U.S. _ [115 L.Ed.2d 720, 111 S.Ct. 2597] [rejecting Eighth and Fourteenth Amendment challenges]; *People v. Edwards* (1991) 54 Cal.3d 787 832-836 [1 Cal.Rptr.2d 696, 819 P.2d 436] [concluding, inter alia, victim impact evidence and argument are admissible as bearing on section 190.3, factor (a), circumstances of the crime].) The prosecutor's argument in this case fell within the general bounds of propriety, as it was not so inflammatory or emotional as to divert the jury's attention from its

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that your attention, if you are going to consider emotions, that at least your attention is at least equally split between Mr. Stanley, and between the victims. [¶] Exhibit 90-B. And this is really what we get down to, this is really the guts of the case. This is really what we are talking about. This is what you see of what Kathy Ann—this is the product of what Mr. Stanley did. [Objection; overruled.] [¶] Exhibit 241, Cheryl Renee Wright—the photograph of her. Nice attractive young lady. [¶] 5-G, photograph of Cindy. This is what Mr. Stanley has done. This is the aggravation."

proper role or invite an irrational, purely subjective response. *(People v. Edwards, supra,* 54 Cal.3d at p. 836.) We therefore find no misconduct.

f. *Comments Invoking Prestige of Prosecutor's Office and Alluding to Personal Knowledge of Facts*

Defendant complains that in urging the jury to return a verdict of death, the prosecutor improperly relied on the prestige of the district attorney's office in alluding to its decision to seek the death penalty against him. The point is waived for lack of a timely and specific objection. *(People v. Noguera, supra,* 4 Cal.4th at p. 638.) Were we to reach the merits, we would reject it. The prosecutor neither invoked the prestige of his office, nor cited his own personal knowledge, in support of the argument defendant was more a deserving of the death penalty than other murderers. In essence, the prosecutor merely sought to persuade the jury that both the facts of Cindy's murder and defendant's personal history warranted a verdict of death, properly observing that not every murder, or even every murder with special circumstances, would call for the ultimate penalty.[33]

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[33]The prosecutor argued as follows: "And in Mr. Stanley's case, you see, you not only have a crime itself, that makes him come within special circumstances, and allows him to receive the verdict of death, but you have it both ways. You also have an individual whose background by reasons of the prior murder conviction,

7. *Refusal to Delete Portions of Videotape*

At defendant's behest and over the prosecution's objection, the twelve and one-half hours of videotape of Dr. Axelrad's narcohypnotic interview of defendant was played to the jury in connection with Dr. Axelrad's testimony concerning defendant's asserted mental disorders.[34] The trial court, however, denied defendant's motion under Evidence Code section 352 to edit the tapes to omit any reference to defendant's third wife, Diana Lynn, and his rape of Cindy. Relying on *People v. Coleman* (1985) 38 Cal.3d 69 [211 Cal.Rptr. 102, 695 P.2d 189], defendant contends the trial court's ruling

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also brings him within special circumstances, also allows the jury to impose a verdict of death. [¶] So, it is not every case of murder, not every case of first degree murder, and it is fair to say it is not even in every case of murder with special circumstances where a death penalty would be asked of the jury."

[34]In addition to the videotapes, Dr. Axelrad had 29 hours of audiotapes of his interviews with defendant, which were not played to the jury. Outside the presence of the jury, he testified it was more important for the jury to see the videotapes than hear the audiotapes and that both sets covered basically the same material.

constituted prejudicial error.[35]

In *Coleman, supra,* the defendant had shot his wife, child and niece. His defense was diminished capacity. In forming their opinions, the defense psychiatrists had relied in part on three letters written by the defendant's wife in which she stated the defendant had many times threatened to kill the family and had twice before threatened to hurt her. Over defense objection, the trial court permitted introduction of the letters for the limited purpose of cross-examining the defense's expert witnesses. This court reversed.

Recognizing that courts have traditionally given parties wide latitude in the cross-examination of experts to test their credibility, including use of evidence inadmissible on direct examination, this court stated: "Nevertheless, the trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses." *(People v. Coleman, supra,* 38 Cal.3d at p. 92.) In *Coleman,* we concluded the trial court

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[35]Defendant does not directly cite the references to Diana Lynn that were the basis of his motion to delete. Rather, he refers to pages of the record where the defense cited particular pages of the videotape and audiotape transcnpts. Most of the references are to the audiotapes. Because neither the audiotapes nor the transcripts are part of the record, nor were the audiotapes introduced into evidence, the contents of those tapes have no relevance to this appeal.

abused its discretion by permitting extensive questioning of the expert witnesses on the contents of the letters. "Accusatory statements 'from the grave' such as these," we stated, "have so great a potential to unfairly prejudice the defendant that the courts have long recognized that a limiting instruction will be insufficient to prevent improper use. [Citations.]" (38 Cal.3d at p. 93.) The letters, we observed, were not of major significance in the experts' evaluation of the defendant's mental capacity, and those portions that the prosecutor "legitimately offered" to challenge the psychiatric opinions "could have been selected and presented in a fashion which would have lessened their emotional impact and would have avoided the improper inference that the victim's accusations were true." *(Ibid.)*

Unlike in *Coleman,* in this case the tapes were offered by the defense, over the prosecution's objection. Dr. Axelrad was of the opinion defendant suffered, inter alia, from intermittent explosive disorder. In a hearing outside the presence of the jury, Dr. Axelrad testified that one of the criteria for intermittent explosive disorder is "intermittent episodes of loss of control of aggressive behavior which results in violence or serious destruction of property." Much of the basis for his opinion appeared in the videotaped narcohypnotic interview with defendant, and he believed viewing the tape would assist the jury in understanding the basis for his opinion. In making his diagnosis he used all the information available to him, although not all the information was necessary to his ultimate conclusion. He specifically considered the various

episodes of unprovoked violence he knew of, including the alleged sexual assault against Cindy. Although he felt it was important to explore defendant's relationship with Diana Lynn, and he considered the information defendant provided about the relationship, that information was not essential to his diagnosis because defendant did not disclose any behavior toward Diana that was consistent with his disorder. Defendant had made it a condition of the narcohypnotic interview that Dr. Axelrad not ask him anything about Diana Lynn.[36] Such a precondition to an interview, Dr. Axelrad testified, can influence its outcome and would be important to know about in evaluating the procedure.[37]

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[36]Dr. Axetrad knew from investigative reports and prior interviews with defendant that defendant married Diana Lynn while he was in prison for the murder of his second wlfe, Kathy, and that some months after defendant's release from prison Diana disappeared. In prior interviews defendant had denied he had anything to do with Diana's disappearance and claimed she was still alive.

[37]In response to the prosecutor's question whether the promise alone could be enough to ruin the validity of the hypnotic experience, Dr. Axelrad stated: "No. It cenainly can—it cenainly . . . makes the procedure a procedure that has to be much more critically examined in terrns of the inforrnation provided. It is not an ideal situation. In fact, it is a

Following argument, the trial court denied defendant's motion to exclude the references to the rape charges and Diana Lynn. The court determined the probative value of the evidence "substantially outweighs" the probability its admission would create substantial danger of undue prejudice.

The court's ruling was not an abuse of discretion. As the court observed, Dr. Axelrad testified all the matters on the tape were considered by him. The alleged rape of Cindy was "essential" to his diagnosis. Further, in Dr. Axelrad's view the rape bore a significant relationship to defendant's murder of Cheryl Renee Wright, in that it was likely defendant killed Cheryl after she rejected his sexual advances, just as he killed Cindy after he allegedly raped her. Unlike the accusatory letters in *People v. Coleman, supra,* 38 Cal.3d 69, Cindy's charges did not accuse defendant of the very act for which he was on trial, the charges were supported by independent evidence known to Dr. Axelrad, and they did not undermine the defense. To the contrary, Cindy's charges supported the defense of intermittent explosive disorder.

Although the references to Diana Lynn were not essential to Dr. Axelrad's intermittent explosive

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situation that the person examining the individual in the interview, the hypnotic interview. in reviewing the infommation after the interview is over. has to be very careful in temms of interpreting any infommation because of the promise. It is not ideal. It is far from being ideal."

disorder diagnosis, Dr. Axelrad considered defendant's relationship with Diana Lynn important, and his promise not to question defendant about Diana Lynn was relevant to the validity of the interview. The references, moreover, were of themselves innocuous.[38] At no time do they indicate Diana Lynn met with violence or that

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[38]The videotape references to which defendant objected were as follows: (I) defendant accused his investigator of wanting to listen to his hypnotic interview in the hope of finding the whereabouts of Diana Lynn and the man she is with, because of the "extremely large reward" offered for the man; (2) Dr. Axelrad mentioned having discussed with defendant's mother an experience she had with defendant "during the time that Diana Lynn was in jail",(3) defendant said he had seen a picture of Diana Lynn in a fishing and hunting newsletter that she must have sent in knowing he would see it; (4) defendant, while discussing the mileage he put on the Camaro, mentioned that during that time he was 'thinking about driving to Lakeview [Oregon] to try to see Diana"; (5) Dr. Axelrad promised defendant that he would return Diana Lynn's diary to defendant's mother; (6) defendant stated he asked his parole agent about his fired diary from Diana Lynn's"; (7) Dr. Axelrad, in the context of discussing an incident between defendant and his mother, suggested that defendant was angry with his mother because she did not like Diana Lynn and would not help defendant bail her out of jail.

defendant was connected with her disappearance. Defendant does not contend otherwise. Rather, he complains that the prosecutor, in cross-examining Dr. Axelrad, went over the alleged rape of Cindy and the disappearance of Diana Lynn in some detail, thereby ensuring the information "would impress the jury" when it came time to make its penalty decision. But the scope of the prosecutor's cross-examination was not before the court when it denied defendant's motion to edit the tapes, nor did defendant object during the cross-examination. Neither does defendant raise the prosecutor's cross-examination as error on appeal. The probative value of the references to Diana Lynn lay not in the truth of anything said on the tape, but in the fact that, despite the admittedly important contribution to Dr. Axelrad's diagnosis information about defendant's relationship with her would have made, Dr. Axelrad asked defendant no questions about it because of a promise he had made to defendant, which promise detracted from the interview as a valid diagnostic tool. Consequently, even had the references to Diana Lynn been deleted from the tapes, the prosecutor clearly would have been entitled to cross-examine Dr. Axelrad on matters that he admitted weakened the validity of the interview.

The trial court, having ruled the tapes were admissible, did not abuse its discretion in ruling "the entire matter" should be presented to the jury.

8. *Refusal to Re-Voir Dire Jury at Resumption of Penalty Phase*

The penalty phase of this case was interrupted for more than three months by the trial on the issue of defendant's competency. Defendant complains this extended hiatus created a significant risk the penalty phase jurors would be exposed to prejudicial extraneous information about the case. He contends the trial court erred in refusing his request that each member of the jury be questioned as to whether anything had occurred during the interruption that would interfere with his or her ability to continue as a fair and impartial juror.

The right of every criminal defendant to trial by a jury that considers only the evidence admitted in court is, of course, fundamental. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16; *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473 [13 L.Ed.2d 424, 428-429, 85 S.Ct. 546].) "It is well settled that it is misconduct for a juror to read newspaper accounts"—or, one could add, to listen to broadcast media reports or otherwise to acquire extrajudicial information regarding—"a case on which he is sitting ...." *(People v. Holloway* (1990) 50 Cal.3d 1098, 1108 [269 Cal.Rptr. 530, 790 P.2d 1327].) Defendant concedes the defense ordinarily bears the burden of establishing misconduct *(People v. Marshall* (1990) 50 Cal.3d 907, 949 [269 Cal.Rptr. 269, 790 P.2d 676]), but argues the length of the hiatus in his case should raise a presumption jurors were exposed to improper material, thereby obviating the need for a specific showing of misconduct. We decline to create such a rule. During the trial, the trial court admonished the jurors each evening to avoid discussing the case, forming or expressing any

opinion on it, or reading or listening to anything connected with the case that might appear in the news media. Just before the hiatus, the court gave a particularly strong admonition, set forth in the margin.[39] In the absence of any contrary showing,

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[39]"Now, the Court would advise the jury that we're going to be taking a recess in these proceedings, and at this time the Court is not in a position to advise the jury of the length of the recess. So you'll be retained on call, and the Court read Mrs. Kester's situation, and, of course, we have alternative jurors.

"The Court would anticipate that we would be able to give you a week or two weeks' notice of when to return to court. Hopefully we'd be able to give you two weeks' notice, but at least a week's notice. So we would ask you to go about your daily life as usual, resume your usual activities, do what you have scheduled, and—but you're being retained on call, and at the appropriate time, the Court will cause you to be notified.

"**Now, pending** your return on call, the Court would mention this admonition. As I have explained to you a number of times, the wording of the admonition is that it's your duty as jurors not to discuss this case or anything pertaining to it either amongst yourselves or with any other person or persons, nor pemmit it to be discussed in your presence.

"It is further your duty as jurors not to form or express any opinion concerning any issue here until such time as you've heard all of the evidence and the

we presume the jurors followed the admonition.

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arguments of Counsel and the Court's instructions as to the law, and the Court has placed it in your hands for your decision in the sanctity of the jury room.

"And should there be anything in the news media, either the newspaper, radio or television news, concerning this trial or anything remotely related to it, you're requested, admonished, instructed and directed to immediately refrain from reading, viewing, or listening to the same as the case may be.

"Now, I'd like to enlarge upon this admonition a little bit. The Court is asking you to go about your daily life as usual, as if you weren't on jury duty. The Court would caution you not to permit anyone to approach you, nobody in your family, or where you work, or allow anyone to make any comment to you, and avoid any of the news media, so as to— when you return to court, that you will be in the same state and frame of mind, not contaminated by any outside— anything outside the courtroom that you've heard here in this courtroom.

"As the Court has indicated, at this time the Court is unable to give you an approximation as to when you will retum, but bear in mind this is a very important admonition, very important admonition, and go about your daily lives and vacations, what you have planned. and remain on call, though.

"At this time, then, we'll excuse you—we aren't releasing you, merely excusing you, subject to being kept on call."

(See *People v. Lanphear* (1980) 26 Cal.3d 814, 835-836 [163 Cal.Rptr. 601, 608 P.2d 689]; Evid. Code, § 664.)

9. Admission of Photographs

Defendant contends the trial court erred in admitting, over his objection, People's exhibits Nos. 90-B and 90-C, two photographs of Kathy Stanley's slain body. The first showed the body lying supine on the ground near the automobile at the crime scene; the second, shot from a greater distance, showed the body covered by a sheet. Defendant argued at trial, and renews his argument here, that the photographs were irrelevant and unnecessary because the prosecution had already proved defendant was convicted of Kathy Stanley's murder. The court overruled the objection, commenting the photographs were neither gruesome nor offensive and depicted the location of the murer in relation to the school grounds. We find no abuse of discretion in the admission of People's exhibits Nos. 90-B and 90-C. As the trial court noted, the photographeds wereneither greusome not inflammatory, and helped to illsustrate the circumstances of defendant's prior murder. As such, they had obvious relevance and did not unduly prejudice defendnat.

Defendant argues the trial court erred in admitting photographs depicting Cheryl Renee Wright'd murdered body at the well sire where the body was discovered. The prosecution offered a series of photographs showing hoe the body had been weighed down with boards, which in turn were covered with boxes of gravel and loose gravel. The

pictures were clearly relevant to show defendant's efforts to conceal the bpdy and how he had come into contact withthe gravel. They isslustrated the restimony of the state geologist, who indentified the gravel at the well site as being of the same type as that found in defendant's car. Defense counsel objected to admission of all of the well site photographs, and the trial court indicated agreement with the prosecutor then withdrew his offer of those two photographs, and the trial court admitted the remaining photographs, which focused on the gravel, oil and debris and revealed smaller protions of the body. Defendant now contends that because there was no defense challenge to the expert testimony linking the gravel found in the Camaro with that at the well site, admission of the photographs constituted prejudicial error. We disagree. Photographic evidence is no inadmissable merely because it issutrates eyewitness testimony or confirms other unchallenged evidence. *(People v. Thomas (1992) 2Cal.4th 489,542 [7 cal.Rptr.2d 199, 828 P.2d 101].)* We conclude the Wright photographs were neither cumlative, greusome, nor inflammatory. The trial court did not abuse its discretion in admitting them.

10. *Claims of Instructional Error*

a. *Refusal to Modify Limiting Instruction*

The court instructed the jury they could consider defendant's statements in the videotapes only for the limited purpose of showing the information on which Dr. Axelrad based his opinion and not for the truth of the facts asserted i the statements. Citing

Green v. Georgia (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct 2150] (*Green*) and *People v. Harris, supra*, 36 cal.3d 36 (*Harris*), defendant contends the court erred in refusing to modify the mimiting instruction to tinstruct the jury they could consider the tapes for whatever mitigating value they had. Ths argument is meritless.

In *Green, supra*, 442 U.S. 95, the United States Supreme Court held due process concerns overrode state evidentiary rules, so as to require admission, at the penalty phase of a capital trial, of a highly relevant and reliable hearsay statement in which defendant's crime partner, separately tried, had admitted he committed the killings. The statement had been admitted at the crime partner's trial, but under Georgia's hearsay rules was inadmissible at defendant's trial. *(Green, supra* 442 U.S. at pp. 96-97 [60 L.Ed.2d at pp. 740-741].) In *Harris, supra,* 36 Cal.3d 36, three members of this court in a plurality opinion expressed the view that, under *Green,* the trial court had erred in refusing at the penalty phase to admit poetry the defendant had written while in custody on another offense and before he was charged in the capital case. The opinion emphasized, however, that the *Green* theory of admissibility "require[s] that the proponent of the evidence show that the evidence is trustworthy or reliable." (36 Cal.3d at p. 70; see also *People v. Livaditis* (1992) 2 Cal.4th 759, 777-780 [9 Cal.Rptr.2d 72, 831 P.2d 297]; *People v. Edwards, supra* 54 Cal.3d 787, 818-821, 837-839.)

In the instant case the tapes had no indicia of reliability. The statements did not predate the

instant charges; rather, they were made contemporaneously with the criminal proceedings and specifically to provide evidence for the defense. The conditions under which the statements were made cast further doubt on their reliability. According to Dr. Axelrad, defendant would tell the truth only if he wanted to, so the reliability of the information was no greater than that obtained in any ordinary interview, and he had so informed defendant; the limitation defendant placed on questions about Diana Lynn required that the procedure be "much more critically examined" than otherwise in evaluating its reliability; and hypnosis can induce not only enhanced memory, but hypersnesia, or "increased memory," that may result in information that is not true.

In these circumstances, the court did not err in refusing to modify its limiting instruction. Any contrary ruling would have permitted defendant to give self-serving testimony free from cross-examination as to its validity.[40]

Gregg v. Georgia (1976) 428 U.S. 153, 204 [49 L.Ed.2d 859, 891-892, 96 S.Ct. 2909] and *State v.*

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[40]In the videotaped interview defendant denied responsibility for the murders of Cindy and Cheryl Renee Wright and the arson of Cindy's house, blaming others for those acts. He claimed amnesia concerning the actual shooting of Kathy and asserted he should have been convicted of manslaughter rather than murder.

Davis (1984) 96 N.J. 611 [4 77 A.2d 308, 314, 47 A.L.R.4th 1055], also cited by defendant, are inapposite. Those cases argue for a broad view of relevancy in the sentencing phase of a death penalty case; they are not authority for the proposition that potentially unreliable evidence should be admitted in the absence of an opportunity for confrontation. In the case at bench, the defense was free to introduce competent evidence, including defendant's testimony, of the matters referred to on the tape, including his remorse for Kathy's murder, his regret over his brother's suicide, his love for his family, and the like. The court, however, properly denied defendant's motion to present such evidence without affording the prosecution the opportunity for cross-examination.

b. *Refusal to Instruct on Mercy*

Defendant contends the trial court erred in refusing to instruct the jury that in determining the appropriate penalty it could consider mercy. The jury in this case was instructed to consider, among other factors, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and "[a]ny other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death including but not limited to defendant's character, background, history, mental condition, physical condition, and sympathy or pity for the defendant." We have repeatedly held that a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise "mercy." *(People v. Montiel (1993)* 5 Cal.4th 877,

943 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Caro* (1988) 46 Cal.3d 1035, 1067 [251 Cal.Rptr. 757, 761 P.2d 680].) Defendant suggests no persuasive reason to depart from our precedents.

c. *Brown Error*

Defendant argues the instructions given in this case, in delineating the scope of the jury's sentencing discretion, impermissibly left "room for . . . . confusion" *(People v. Brown, supra,* 40 Cal.3d 512, 544, fn. 17), a potential that was exacerbated by the trial court's refusal to instruct the jury it couldexercise mercy.We have reviewed the record *(People v. Proctor, supra,* 4 Cal.4th 499, 547) and conclude the jury was not misled to believe it was required to impose the death penalty. The jury was instructed, inter alia, as follows: "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable: [¶] . . .[¶] (K) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. [¶] (L) Any other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death including but not limited to defendant'scharacter, background, history, mental condition, physical condition, and sympathy or pity for the defendant." The instructions were sufficient to apprise the jury of the scope of its discretion. The prosecutor's closing argument did not, contrary to defendant's

assertions, increase the potential for confusion; rather, it conveyed to the jury the necessity of weighing evidence in aggravation against that in mitigation. Defense counsel's closing argument further emphasized the discretionary nature of thejury's determination and the propriety of exercising mercy. We see no possibility the jury was misled.

d. *Reasonable Doubt Instruction*

In addition to his other claims of instructional error in the penalty phase, defendant reiterates his constitutional challenges to CALJIC No. 2.90, which was read to the jury in connection with the evidence of other criminal activity introduced against defendant. (§ 190.3, factor (b).) For the same reasons that we rejected his arguments in the guilt phase portion of his appeal, we reject them here. (See *Victor v. Nebraska, supra,* 511 U.S. _, _ [127 L.Ed.2d 583, 595-596, 114 S.Ct. 1239]; *People v. Freeman, supra,* 8 Cal.4th at pp. 503-504.)

11. *Constitutionalit of 1978 Death Penalty Law*

Defendant argues that California's death penalty law, and instructions predicated on the statutory language, are unconstitutional in various respects.

Defendant contends that under the rule of *Stringer v. Black* (1992) 503 U.S. 222 [117 L.Ed.2d 367, 112 S.Ct. 1130] certain sentencing factors set forth in section 190.3 are unconstitutionally vague. Specifically, he argues the language of section 190.3, factors (a), (b), and (i), as read to the jury,

fails adequately to define the elements of those factors. We have previously rejected this argument (see, e.g., *People v. Berryrnan* (1993) 6 Cal.4th 1048, 1096-1097 [25 Cal.Rptr.2d 867, 864 P.2d 40] [factor (a)]; *People v. Bacigalupo (1993)* 6 Cal.4th 457, 478 [24 Cal.Rptr.2d 808, 862 P.2d 808] [factor (b)]; *People v. Noguera, supra,* 4 Cal.4th at p. 649 [factor (i)], and the United States Supreme Court has likewise upheld the factors against federal constitutional challenge. *(Tuilaepa v. California* (1994) 512 U.S. _, _ [129 L.Ed.2d 750, 762-764, 114 S.Ct. 2630].) Defendant also contends factor (k) (§ 190.3, factor (k) [allowing the jury to consider any other circumstance that extenuates the gravity of the crime, even though it does not provide an excuse]), in the context of the prosecutor's argument, invited the jury to consider evidence of defendant's background *in aggravation.* Defendant's reasoning is not altogether clear, but in any event the contention lacks merit. The prosecutor merely commented on the paucity of mitigating evidence introduced by the defense; in no way did he convert factor (k) into an aggravating factor.

Defendant contends the trial court erred in not deleting from the section 190.3 instruction those factors having no relevance to this case, and in not specifically informing the jury which factors are aggravating and which mitigating. We have rejected these arguments many times before, and defendant presents no reason to depart from our earlier decisions. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 271 [24 Cal.Rptr.2d 421, 861 P.2d 1107] [failure to characterize the penalty factors as either aggravating or mitigating does not render the

statute unconstitutional]; *People v. Fauber, supra,* 2 Cal.4th 792, 866 [failure to delete inapplicable penalty factors from jury instructions is not erroneous].) Defendant also argues the failure to require written findings by the jury on the aggravating factors it selected deprived him of his right to meaningful review of his sentence under the Eighth and Fourteenth Amendments; we have previously held to the contrary. *(People v. Fauber, supra,* 2 Cal.4th at p. 859.) He contends California law is constitutionally defective for not requiring the jury to find that all aggravating factors it employs, as well as the ultimate determination that death is the proper penalty, were proven beyond a reasonable doubt. We rejected these contentions in *People v. Webb* (1993) 6 Cal.4th 494, 536 [24 Cal.Rptr.2d 779, 862 P.2d 779]) and other cases.

Defendant also contends intercase proportionality review is constitutionally required. It is not. *(Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [79 L.Ed.2d 29, 40-41, 104 S .Ct. 871].)

Defendant argues that the adjectives "extreme" and "substantial," modifying two of the mitigating factors (§ 190.3, factors (d) and (g)), render those factors unconstitutionally vague, arbitrary and incapable of principled application, while erroneously suggesting to the jury such evidence may not be considered if less than extreme or substantial. We have rejected similar arguments in the past, and defendant submits no persuasive reason to change our views. (See, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 163 [10 Cal.Rptr.2d 554, 833 P.2d 561]; *People v. Gonzalez* (1990) 51 Cal.3d 1179,

1227 [275 Cal.Rptr. 729, 800 P.2d 1159].)

Defendant contends the 1978 death penalty law is unconstitutional because it contains so many special circumstances that it fails to perform the narrowing function required by the Eighth Amendment and to provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *(People v. Edelbacher, supra,* 47 Cal.3d at p. 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 [33 L.Ed.2d 346, 392, 92 S.Ct. 2726].) This contention has been rejected by the United States Supreme Court *(Pulley v. Harris, supra,* 465 U.S. at p. 53 [79 L.Ed.2d at p. 42]) and by this court (see, e.g., *People v. Wader,* 5 Cal.4th 610, 669). Defendant mounts a further constitutional attack on the "unbounded" discretion prosecutors exercise in deciding in which cases to seek the death penalty. We have previously declined to find any constitutional infirmity in this aspect of CalLfornia's death penalty scheme. *(People v. Wash, supra,* 6 Cal.4th at p. 722; *People v. Keenan, supra,* 46 Cal.3d at p. 505.) Defendant offers no reason why we should depart from these earlier decisions, and we adhere to them.

III. DISPOSITION

The judgment is affirrmed.

Lucas, C. J., Mosk, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

SUPREME COURT OF THE STATE OF CALIFORNIA

FILED SEPTEMBER 13, 1995
NO. S004605

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff And Respondent,

vs.

GERALD FRANK STANLEY,
Defendant And Appellant

[Modification of opinion (10 Cal.4th 764; 42 Cal.Rptr.2d 543, 897 P.2d 481).]

THE COURT.—The opinion herein, appearing at 10 Cal.4th 764, is modified to read as follows:

The third sentence of the first full paragraph on page 803 [see Appendix page 60] commencing with the words "Because defendant also objected," is modified to read:

"After defendant initially objected to the competency hearing but thereafter withdrew his objection, the trial court asked whether he wished the court to appoint an attorney to represent him, either in conjunction with his present counsel or without his present counsel.

The modification does not affect the judgment.

SUPREME COURT OF THE STATE OF CALIFORNIA

FILED SEPTEMBER 13, 1995
NO. S004605

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff And Respondent,

vs.

GERALD FRANK STANLEY,
Defendant And Appellant

Petition for rehearing DENIED.

Opinion modified.

Appellant's Motion to Stay Issuance Of Remittitur DENIED.

SUPREME COURT OF THE STATE OF CALIFORNIA

NO. S004605

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff And Respondent,

vs.

GERALD FRANK STANLEY,
Defendant And Appellant

TO THE SUPERIOR COURT, COUNTY OF BUTTE

I, ROBERT F. WANDRUFF, CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE COPY OF AN ORIGINAL JUDGMENT ENTERED IN THE ABOVE-ENTITLED CAUSE ON THURSDAY, THE 6TH DAY OF JULY, 1995.

WITNESS MY HAND AND THE SEAL OF THE COURT THURSDAY, THE 14TH DAY OF SEPTEMBER, 1995.

ROBERT F. WANDRUFF,
CLERK

BY /s/ M. JAMESON (Deputy)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF BUTTE

FILED FEBRUARY 7, 1984
NO. 79825

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

GERALD FRANK STANLEY,
Defendant

COMMITMENT ON JUDGMENT OF DEATH
JUDGMENT OF DEATH
DEATH WARRANT

TO:THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN

BE IT REMEMBERED that on the 6th day of October, 1980, Information No. CR-1323 was duly filed against Defendant, Gerald Frank Stanley, by the District Attorney of Lake County charging Defendant, Gerald Frank Stanley, with three felony counts. Defendant was charged in the three counts as follows:

COUNT ONE: Murder in violation of Section 187 of the Penal Code, committed on or about the 11th day of August, 1980, to wit: the murder of Cynthia Rogers Stanley, said Murder being a willful, deliberate, and premeditated killing and said murder was perpetrated while lying in wait.

It was further charged and alleged that said Murder was committed under the following Special Circumstances, to wit:

The defendant intentionally killed the victim while lying in wait, within the meaning of Penal Code Section 190.2(a)(15).

The defendant was previously convicted of second degree murder on and about the 30th day April, 1975, in the Superior Court of the State of California, in and for the county of Contra Cost, in violation of Section 187 of the Penal Code, State of California, within the meaning of Penal Code Section 190.2(a)(2).

The defendant knew that Cynthia Rogers Stanley was a witness to a crime who was intentionally killed for the purpose of preventing her testimony in criminal proceedings, but that said killing was not committed during the commission and attempted commission of the crime to which she was a witness, within the meaning of Penal Code 190.2(a)(10).

It was further charged and alleged as follows:

The defendant personally used a firearm, to wit: a rifle, within the meaning of Penal Code Section 12022.5.

The defendant was on and about he 30th day of April, 1975, in the Superior Court of the State of California, for the County of Contra Costa, convicted of a violate felony, to wit: Murder in

violation of Section 187 of the California Peral Code, that he served a separate term in state prison of one year and more for said offense, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of said term, within the meaning of Penal Code section 667.5(a).

COUNT TWO: The defendant was charged in Count Two of said Information with the crime of Arson in violation of Section 451 of the Penal Code, committed on or about the 18th day of July, 1980, to wit: the arson of a house located at 6902 Monte Mar Drive, Lucerne, California, and occupied by Cynthia Rogers Stanley.

It was further charged and alleged that defendant was on and about the 30th day of April, 1975, in the Superior Court of the State of California, for the County of Contra Costa, convicted of the crime of murder, a felony, in violation of Section 187 of the California Penal Code, and that he then served a separate term in state prison of one year and more for said offense, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667.5(b).

COUNT THREE: The defendant was charged in Count Three of said Information with the crime of Burglary in violation of Section 459 of the Penal Code, committed on or about the 12th day of

August, 1980, to wit: the Burglary of a trailer coach and building occupied by Roger Agusto Estrada.

It was further charged and alleged that defendant was on and about the 30th day of April, 1975, in the Superior Court of the State of California, for the County of Contra Costa, convicted of the crime of murder, a felony, in violation of Section 187 of the California Penal Code, and that he then served a separate term in state prison of one year and more for said offense, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code section 667.5(b).

It was further and separately alleged that the defendant, committed said offenses charged in Counts One, Two and Three, while he was on state prison parole pursuant to Penal Code Section 3000, following a term of imprisonment imposed for having committed a violate felony, to wit, murder in violation of Section 187 of the California Penal Code, within the meaning of Penal Code Section 1203.08(a).

Thereafter, the Defendant, Gerald Frank Stanley, on October 6, 1980, was duly arraigned in the Lake County Superior Court and entered his personal pleas of Not Guilty to Counts I, II, III, and denied all allegations contained in each of those counts, and further denied the allegation that the offenses were committed while he was on parole from a violent felony. [Handwritten Note From Judge William R.

Patrick, dated 11/21/95: Further on or after October 6, 1980 Mr. Stanley entered a dual plea of not guilty and not guilty by reason of insanity. On October 12, 1992 Gerald Frank Stanley, with caveat of counsel, withdrew his not guilty by reason of insanity plea.]

Thereafter, the defendant and his counsel being present, a motion for change of venue was granted on the 7th day of December, 1982. On December 17, 1982, the Court found Butte County a proper place for the transfer of this matter and ordered this case transferred to the Count of Butte with trial set to commence and 8:30 a.m., on Tuesday, January 18, 1983.

Thereafter, the defendant and his counsel being present, the matter proceeded to trial by jury on the 18th day of January, 1983 in Butte County Superior Court as Case Number 79825.

Thereafter, on the twenty-second day of July, 1983, the jury returned the following verdicts:

The jury found the Defendant, GERALD FRANK STANLEY, guilty of Murder in the First Degree of Cynthia Rogers Stanley as charged in Count One.

The jury further found the Special Circumstances, murder while lying in wait and for the purpose of preventing the victim's testimony as a witness in a criminal proceeding in connection with Count One.

The jury further found the Defendant, Gerald Frank Stanley, guilty of Arson as charged in Count

Two.

The jury further found the Defendant, Gerald Frank Stanley, guilty of Burglary in the Second Degree as charged in Count Three.

In a separate proceeding on August 2, 1983, the jury also found true the special circumstances allegation that defendant has previously been convicted of second degree murder. Pursuant to the parties' waiver of a jury trial, the court on August 2, 1983 found true the allegation that defendant had served a prior prison term and had not remained free of prison custody for five years without commission of another felony offense resulting in a conviction.

A competency trial was commenced on October 17, 1983 before a separate jury which found the defendant mentally competent on November 17, 1983.

As prescribed by Section 190.1 of the California Penal Code, the matter proceeded to the penalty phase of the trial before the same jury which handled the guilt phase and that jury rendered the following verdict on December 28, 1983:

"THE PEOPLE OF THE STATE OF CALIFORNIA V. GERALD FRANK STANLEY: We, the Jury in the above entitled case, having previously found the defendant, GERALD FRANK STANLEY, guilty of a violation of Section 187 of the Penal Code of the State of California, to wit: MURDER IN THE FIRST DEGREE, now find that the aggravating circumstances outweigh the mitigating

circumstances and determine the punishment to be Death."

Thereafter, on the 7th day of February, 1984, the defendant's Motion for New Trial was denied and the Automatic Motion for Modification of Verdict or Finding Imposing the Death Penalty, was denied; and the Honorable Court made its independent determination that the weight of the evidence supported the jury's findings and verdicts, and the court set forth the reasons for the court's ruling on the record and with respect to Court [sic] One. [Handwritten Note From Judge William R. Patrick, dated 11/21/95: On Feb. 7 1984 defendant was formally arraigned for Judgment and _____] and the Honorable Court ordered that the Defendant, GERALD FRANK STANLEY, shall suffer the penalty of death, said penalty to be inflicted within the walls of the State Prison at San Quentin, California, in the manner and means prescribed by law at a time to be fixed by this court in the Order of Execution.

WHEREAS, on an automatic appeal to the Supreme court of the State of California in the case of People v Gerald Frank Stanley, California Supreme Court Case No. S004605, Criminal Case No. 79825, decided on the 6th day of July, 1995, the conviction of Murder with Special Circumstance was affirmed and the judgment of the Superior Court of the County of Butte imposing the death penalty was affirmed.

WHEREAS, there is at this time no stay of execution pending in any court of the State of California, Supreme Court of the United States or

Circuit Court of the United States.

IT IS HEREBY ORDERED AND ADJUDGED that for the crime of murder in the first degree with a special circumstance, the defendant, GERALD FRANK STANLEY, shall suffer the death penalty and that said penalty be inflicted within the walls of the State Prison of San Quentin, California, in the manner and means prescribed by law;

FURTHER, this is to command you, the Warden of the State Prison of the State of California t San Quentin, California, to hold in your custody the said GERALD FRANK STANLEY, and pursuant to Penal Code Section 1193, to carry into effect the judgment of the court by putting to death the said GERALD FRANK STANLEY in the manner and means prescribed by law on the 16th day of February, 1996 at a time to be set by the Warden.

IN TESTIMONY WHEREOF, I have set my hand as a judge of the Superior Court and have caused the seal of said court to be affixed this 21st day of November, 1995.;

_____

WILLIAM R. PATRICK
Judge of the Superior Court
In and For The County of Butte

ATTEST:
Candace J. Grubbs, Ex Officio Clerk of the Superior Court of the State of California, in and for the County of Butte

/s/ M. O'Connell
Deputy County Clerk[SEAL]
11/21/95
Dated

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE AND ON RECORD IN THIS OFFICE
DATE: 11/21/95 [SEAL]

County Clerk and Clerk of the Superior Court in and for the County of Butte, State of California

By /s/ M.O'Connell Deputy

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

December 1, 1995

Mr. Frank Hagie
685 Market Street
Suite 360
San Francisco, CA 94105

Re:Gerald Frank Stanley v. California
Application No. A-471

Dear Mr. Hagie:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on December 1, 1995, extended the time to and including January 11, 1996.

This letter has been set to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By /s/
Sandra Elliott Spagnolo
Assistant Clerk

PROVISIONS OF THE CALIFORNIA PENAL CODE

§1367. Mentally incompetent person; Effect of incompetency

A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

§1368. Inquiry into defendant's mental competence when doubt arises prior to judgment; Procedure

(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he shall state that doubt in the record and inquire the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time.

(b) If counsel informs the court that he believes the defendant is or may be mentally incompetent, the

court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

(c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosection shall be suspended until the question of the present mental competency of the defendant has been determined.

If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would result if the jury is retained on call.

If the defendant is declared mentally incompetent, the jury shall be discharged.

§1369. Order of trial of question of mental competent

A trial by court or jury of the question of mental competence shall proceeding the following order:

(a) The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court

shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. If it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled established under Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, or the designee of the director, to examine the defendant. The court may order the developmentally disabled defendant to be confined for examination in a residential facility or state hospital.

The regional center director shall recommend to the court a suitable residential facility or state hospital. Prior to issuing an order pursuant to this section, the court shall consider the recommendation of the regional center director. While the person is confined pursuant to order of the court under this section, he or she shall be provided with necessary care and treatment.

(b)(1) The counsel for the defendant shall offer evidence in support of the allegation of mental incompetence.

(2) If the defendant declines to offer any evidence in support of the allegation of mental incompetence, the prosection may do so.

(c) The prosecution shall present its case regarding the issue of defendant's present mental

competence.

(d) Each party may offer rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention.

(e) When the evidence is concluded, unless the case is submitted without final argument, the prosecution shall make its final argument and the defense shall conclude with its final argument to the court or jury.

(f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

SUPREME COURT OF THE STATE OF CALIFORNIA,

FIILED FEBRUARY 4, 1984
NO S004605

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff And Respondent

vs.

GERALD FRANK STANLEY,
Defendant and Appellant

PORTIONS OF APPELLANT'S OPENING BRIEF:COMPETENCY TRIAL

I.

APPOINTMENT OF A THIRD DEFENSE ATTORNEY TO REPRESENT APPELLANTS POINT OF VIEW AT THE COMPETENCY PROCEEDINGS CREATED CONFLICT WITHIN HIS REPRESENTATION

Basic notions of due process and fair play mandate that a mentally incompetent defendant not be subjected to criminal proceedings.[2] Such a defendant "though physically present in the

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[2]Drope v. Missouri, 420 U.S. 162 (1975). The Supreme Court stated: "Failure to observe procedure adequate to protect a defendant's right not be tried or convicted while incompetent to stand trial depryes him of his due process right to a fair trial." Id. at 172, citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See Bishop v. United States, 350 U.S. 961, 961 (1956); Carroll v. Beto, 421 F.2d 1065, 1067 (5th Cir. 1970).

courtroom, is in reality afforded no opportunity to defend himself." (Drop v. Missouri, 1975, 420 U.S. 162.)

The standard by which incompetency should be judged was set forth by the U.S. Supreme Court in Dusky v. United States:

It is not enough...to find that the defendant is oriented to time and place and has some recollection of events, but...the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him. 362 U.S. 402 (196) (per curiam)

California's Penal Code Section 1367 codifies this standard.[3]

This competency trial arose after Appellant and his attorneys had a fundamental dispute as to how the penalty trial should proceed.

A. Background

At the point of impasse the prosecution had

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[3]Penal Code Section 1367 provides in relevant part: A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter 11, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

already amassed extensive evidence in aggravation to support their request for death.

The prosecution evidence of significant violence by Appellant spanned fifteen years and included three grisly murders within five years of each other. Two of the murders had been perpetrated upon the female victims in front of their children. The third murder was of a woman Stanley had picked up hitchhiking. There was evidence that Appellant had burned his ex-wife's house down, raped her sister, and threatened numerous persons with violence.

The evidence in mitigation was approximately forty five minutes of testimony of Appellant's mother, son, daughter and brother, to the effect that he had had a difficult childhood and they all loved him and would miss him. Additionally defense attorney Neill read the testimony of psychiatrists Drs. Blender, Thompson, & Morris from Appellant's murder trial in 1975. It was paltry showing compared to the overwhelming evidence against Appellant. Appellant's attorneys tried to call psychiatrist Dr. David Axelrad to testify. He would testify that Appellant suffered from longstanding and current mental illness which partially excused the offenses. Also he would show videotapes of hypnotic interviews with Appellant where Appellant denied killing Cindy Rogers Stanley and express some essential humanity. Appellant refused to allow the doctor to testify.

Appellant gave varying reasons for refusing to waive the privilege. He told his lawyers he was embarrassed to present the testimony because his

children might hear of it and he didn't want the penalty jury to see him cry on the tapes. Also he refused because he was angry with his attorneys for calling Appellant's mother, Edna Stanley to the stand. He told Dr. Axelrad that because his attorneys wouldn't try to influence his children's custody action he wouldn't allow the testimony. Appellant, at the trial judge's urging said he didn't want the tapes shown because, in them, he admitted to trying to strangle his mother, he made statements about Rene Wright's death in Colusa County and about his second wife Diana Lynn, who had strangely disappeared.[4] (112 RT 21657-59.)

Appellant's defense lawyers saw his refusal as legal suicide, but no amount of discussion would convince Appellant, despite his stated desire for life. That the testimony was essential is apparent from a cursory comparison of the evidence.

The mitigation psychiatric testimony that had already been presented was from 1975. It was time bound. It depicted well Stanley's background of emotional problems surrounding his physical defects. It also suggested of his overwhelming dependence on women, and the extreme psychological loss Appellant experienced if abandoned. However, it did not and could not deal with situations in 1983.

Dr. Thompson report of 1975, linked Appellant's previous violent action to the "disassociate state" that Dr. Axelrad currently observed was part of

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[4]Appellant was a suspect in Lynn's disappearance.

Appellant's behavior in the present offense. However, without Dr. Axelrad's testimony no one would demonstrate the link between the 1975 murder and the present conviction. Both murders were committed of women who had left Appellant. In both instances Appellant killed the women while the victim's children watched. In both cases Appellant had been drinking heavily around the time of the offense. The repetition of behavior lent credibility to the psychological assessment of Stanley. Dr Axelrad was the only witness who could explain the connection between the past and present murders in a psychologically sympathetic manner.

Only Dr. Axelrad could give the jury a picture of the Appellant's present mental condition. Without the testimony it seemed Stanley certain death. Stanley's refusal appeared to his attorneys, in light of the probably consequence, to be no judgment at all, but rather insanity. His attorneys, implored by him to save his live [sic], sought resolution of the conflict from the court.

B. Non Cooperation Caused by a Mental Disorder Is Not True Conflict

When a trial judge faces disputes of this kind, where a defendant will not cooperate with counsel they have several choices. One choice is to find that a true conflict exists and to then appoint new counsel to substitute for old counsel.

"to compel one charged with [a] grievous crime to undergo a trial with the assistance of an

attorney with whom he has become embroiled in, unreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever [Citations] Brown v. Craven, (9th Cir. 1970 424 F.2d 1166, 1170.

As this court has stated,

in a few cases the disagreement as to whether a defendant should testify may signal breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel. People v Robles (1970) 2 Cal.3d 216.

A second choice is to find that the right asserted by defendant is so substantial and fundamental that it cannot be denied him and his attorney must agree to it. California courts, for example, have held that defendants are entitled to testify over their counsel's objections because it is a right of fundamental importance:

Although normally the decision whether a defendant should testify is within the competency of the trial attorney (see People v. Gutkowsky, 219 Cal.App.2d 223, 227, 33 Cal.Rptr. 79), where, as here, a defendant insists that he wants to testify, he cannot be deprived of that opportunity.

We are satisfied that the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demand to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a

jury. (People v. Blye, 233 Cal.App.2d 143, 149, 43 Cal.Rptr. 231). People v Robles, supra, 2 Cal.3d 216.

A third choice is to find that no true conflict exists but rather that competency is an issue and the defendant is probably unable to rationally assist counsel. People v. Stankewitz, (1982) 32 Cal.3d 80. Then the court must conduct proceedings pursuant to Penal Code Section 1368 with the defendant fully represented by counsel with whom there is no real conflict.

Any one of these choices would unravel the fundamental dispute presented to the trial court and would guarantee Appellant's sixth amendment rights to counsel.

The trial judge here used an inherently conflictual combination of these approaches.

He first of all expressed a "doubt" about Appellant's competency after hearing testimony that Appellant's refusal was a result of a mental defendant particularly his paranoia regarding the court system. He then initiated Penal Code Section 1368 proceedings and referred the matter to the presiding department of the court. As a matter of law the judge didn't believe the situation presented a true conflict but rather that Appellant's persistent position contrary to his attorneys raised questions regarding his competency. Then, citing no authority, the presiding Judge also appointed a third defense attorney, Donald Blake, as associate defense counsel, to represent Appellant's position in

the "conflict" with his attorneys. (115 RT 22559.)

Attorney Blake was to represent Appellant's view that he was, in fact, competent. Blake did separate voir dire, cross examined all of attorney Petersen's witnesses, objected to tactical choices made by attorney Petersen, and argued Stanley's competency proceedings.[5]

The two lawyers, Blake and Petersen, were present to the jury as Mr. Stanley's lawyers. As part of the defense team they represented the same person and simultaneously advocated opposite positions for the same client within the same proceeding. This constituted conflict within Appellant's representation and fatally flawed the entire proceeding.

The appointment of Blake, resulted in a violation of Appellant's right to effective counsel, denied him due process rights to a fair trial and deprived him of the protection of Penal Code Section 1367-8.

C. Defense Attorney's Duty In Competency Proceedings

Because the initiation of competency proceedings presume the existence of no true conflict, the attorney facing a client who appears to him incompetent continues to represent that client, is entitled to assume that he is incapable of acting in

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[5]Appellant's other attorney, William Neill was a witness in the trial and therefore did not act as attorney.

his own best interests. People v. Hill (1967) 67 Cal.2d 105, 115, and must present evidence even if the defendant does not wish to be presented. People v. Merkouris 19956) 46 Ca.2d 540.

In holding that counsel may, without consulting a defendant, waive the statutory right to have a jury decide his competence, this court affirmed the need for greater prerogative by a defendant's lawyer in these situations:

"First, a section 1368 hearing is held only after there has been a prima facie showing of mental incompetence. Of necessity, therefore, defendant's attorney must play a greater role in making fundamental choices for him, and cannot be expected to seek approval of strategic decisions made in the course of obtaining and presenting proof of incompetence. (People v. Hill (1967) 67 Cal.2d 105, 115 fn. 4, 60 Cal.Rptr. 234, 429 P.2d 586.]" People v. Samuel 91981) 20 Cal.3d 489, 496.)

The court in Samuel supra, distinguished between the situations where a client is adjudged competent and were those where a doubt "as a matter of law" has been raised about a defendant.[6]

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[6]...[I]n Robles we noted that the accused had validly adjudged competent before asserting his right to testify over counsel's objection. (Id. at p. 215, fn. 1, 85 Cal.rptr. 166, 455 P.2d 710.) In so doing, we tactily [sic] recognized the obvious: if counsel represetn [sic] a defendant as to whose competence the jduge [sic] has declared a doubt sufficient to require a section 1368 hearing, he should not be compelled to entrust key decisions

The reasons for the difference in treatments is, of course, the greater protection of the defendant. The beneficent purpose of the competency statute and its proceedings was stressed by this court:

"The procedures [Penal Code Sec. 1368] seem reasonably calculated to protect mentally disordered defendants from the unfair burden of defending a criminal charge when they are unable to understand the charges against them or to assist counsel in their defense. Even when a defendant resists this protection by opposing the evidence of incompetency, it would be unfair to deny him the benefit of treatment for his condition before subjecting him to a potential loss of life or liberty in the criminal proceeding." In re Blye (1981) 116 Cal.3d 569, 576.

Thus, it is obvious that disagreement between counsel and defendant as to the need for competency proceeding, or as to how it is conducted does not justify the appointment of additional counsel. Attorney Petersen was not required to represent Stanley's view of competency. (People v. Samuel, supra 29 Cal.3d 489.) Here the appointment of the third defense attorney, Blake, to

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about fundamental matters to this cleints' [sic] apparently defective judgment. In fact, in People v. Merkouris (1956) 46 Cal.2d 540, 555, 297 P.2d 999, we held that it was an abuse of discretion for the trial court to allow a defendant whose competence was in question to withdraw a plea of not guilty by reason of insanity, thereby in effect pleading guilty, contrary to the advice of his attorney. People v. Samuel (1981) 29 Cal.3d 489, 496.

do just that, contravened both the statutory design of Section 1367 et seq. and the due process rights of Appellant, specifically his right to effective representation, by creating a team of two conflicting lawyers to represent him at the same time.

It also seems apparent that the court did not fully appreciate the purpose, function or procedure of a competency proceeding. In appointing attorney Blake he said

"If I had this court in the current posture, which I understand it is, that Mr. Stanley says, 'No, I don't need this proceeding."

His counsel say, "Yes, I do." If I require Mr. Stanley to cooperate with Counsel that disagree with his personal position, I don't think that that's really going to accomplish much. I think in terms of the 1368 - 1369 proceeding, he needs some one that is at least in accord with is wishes.

D. The Conflict

Once section 1368 is triggered because of a substantial "doubt" a defendant is entitled to a "fair trial." The California Supreme Court has said:

We have laid down no specific rules to control hearings conducted under section 1368 but have instead imposed the requirement that the accused be afforded "all of the elements of the due process. People v. Westbrook, supra, 62 Cal.2d 197, 204, 41 Cal.Rptr. 809, 813, 397 P.2d 545, 549, followed in In re Hedberg, supra, 232 Cal.App.2d

728, 7331, 43 Cal.Rptr. 193. People v. Hill (1967) 67 Cal.2d 105, cert. denied, 389 U.S. 1009.

Thus, among other rights, the defendant is a section 1368 trial is entitled to effective representation by counsel. Representation by counsel is a fundamental element of due process. "[T]he assistance of counsel is among those rights so basic to a fair trial that their infraction can never be treated harmless. Chapman v. California [(1967) 386 U.S. 18, 23,]" (Holloway v. Arkansas, (1978) 435 U.s. 475, 489).

The state and federal constitution guarantees to the assistance of counsel contemplates that such assistance be conflict-free. Leversen v. Superior Court 91983) 34 Cal.3d 530, the classic conflict situation - involves joint representation of co-defendants in the same action. People v. Mroczko (1983) 35 Cal.3d 106). However this court has applied the principles involved in the analysis of conflict in other situations. (E.g. Leversen v. Superior Court, supra, 34 Cal.3d 530. Adverse interest in successive proceedings.) The essential principal is that a defendant is entitled to have his rights enforced to their full extent by an attorney, without conflicting duties or interest diluting that enforcement. People v. Barboza (1981) 29 Cal.3d 375.

The right involved in a competency proceeding is the right not be tried when one is not capable to defending oneself. Drope v. Missouri, supra, 420 U.S. 162. When enough evidence is introduced as a matter of law to raise the issue of that right, a

competency hearing is held. People v. Pennington (1067) 66 Cal.2d 508. A defendant is then entitled to a full advocacy enforcement of that right, whether he want it or not. (In re Blye (1981) 116 Cal.3d 569)

The procedures [P.C. §1368] seems reasonably calculated to protect mental disordered defendants from unfair burden of defending a criminal charge when they are unable to understand the charges against them or to assist counsel in their defense. Even when a defendant resists this protection by opposing the evidence of incompetency, it would be unfair to deny him the benefit of treatment for his condition before subjecting him to a potential loss of life or liberty in the criminal proceeding. In re Blye, supra, 116 CA. 3569, 573, 576.

Here Appellant did not benefit from full advocacy of the right. The full and vigorous representation was diluted by the appointment of an attorney to Appellant's side who had a conflicting duty. Appellant's attorney was ethically bound to zealously guard Appellant's right pursuant to Penal Code section 1368. People v. Samuel, supra, 29 Cal.3d 489, People v. Corona 1978) 80 C.A.3d 648. Attorney Blake's advocacy on Appellant's "side" advocating the opposite end served to denigrate and interfere with Appellant's real rights.

A Penal Code §1368 hearing is adversarial in nature. Here District Attorney Crone fully represented the view that Appellant was competent. That he would so do was apparent long before Attorney Blake was appointed. He argued

vigorously against even having a special proceeding to see if a competency hearing should be held. (112 RT 21817.)[7] At trial he cross examined all witnesses who testified to Appellant's incompetence.

Attorneys Petersen and Blake were treated as though they were on the same side throughout the trial, although they were actually representing conflicting positions. They were treated as a unit and must be conceptually viewed together as Appellant's attorney. In front of the jury the first day of trial, this image as a team was vividly created.

THE COURT: Mr Petersen, I'll ask that you kindly rise, introduce your client, and the two other counsel who are with you in this proceeding.

MR. PETERSEN: Ladies and gentlemen, I'm Richard Petersen. This is Jerry Stanley. This is attorney Don Blake and attorney William Neill. (116 RT 22864, 22865.)

Despite the admitted internal opposition in Blake and Petersen's representation of Appellant, the trial court "limited" the proceedings to two sides:

THE COURT: You may go. Now with reference to

---

[7]The prosecutions advanced the theory that the competency proceedings were either a stalling technique of Appellant's lawyers, in an attempt to coverup their own incompetence, or a chance to make error. (126 RT 24770-77: 24769, 24827-8.)

the two points; one, of the number of sides for the purpose of the jury selection... "I'm going to indicate at this point it appears to the court that there are only two sides; one is the district attorney's side for the People, and the other is Mr. Stanley.

If any counsel feels that that is incorrect, I'll ask that you be prepared at 8:30 tomorrow morning with authorities to support a different position. (116 RT 22918.)

Several other external factors created the impression of a team despite the abiding conflict lying just below the surface. Attorneys Blake and Petersen sat at the same counsel table, shared peremptory challenges, and were referred to as the "defense team" or Mr. Stanley's attorneys. However, the conceptual error of injecting attorney Blake into the representation on the side of Appellant's rights glared at the court early in the trial. Attorney Blake, seeing the obvious conflict between his position and Petersen, asked the court to treat him as a separate side with separate challenges to the jury. (116 RT 22848.) This lengthy excerpt is provided because it represents the flavor of confusion and conflict in the entire trial.

THE COURT: The record may show that we're convening with all counsel. Mr. Crone, Mr. Petersen, Mr. Neill and Mr. Blake, and Mr. Stanley is present.

The Court would inquire of counsel with reference to the number of sides for the purpose of jury selection, do any counsel have any authority to

present to the court on that issue?

MR. BLAKE: No.

THE COURT: Your Honor, I have just a reference that doesn't directly involve me. The section that is 1367 or the section that is 1368 has in it a suggestion of a requirement that if the attorney who represents the individual during the trial, the defendant during the trial, wants there to be a -- well, if he disagrees with a client, that it's necessary or suggested, anyway, that there be a separate attorney appointed.

The Court can look at whatever that specific language is. The we would have an idea as to whether or not, according to the code, there was a recognized separation that necessitated the other attorney to be appointed.

THE COURT: I don't see anything in there that would warrant an interpretation that the defendant therefore, should be treated as two sides.

MR. PETERSEN: Yeah, I understand that it's not a "therefore". I would agree that it is not clear that there's a "therefore". But the background of how this came up, I definitely, at the time I'm sitting at the table now, feel that I have a side to pursue, that is, Mr. Stanley is incompetent, that is different than what Mr. Stanley desires, and that is that he be found competent, and therefore, attorney Blake appointed to represent the separate interest of Mr. Stanley in relation to that theoretically, at least, though it is a private between Mr. Stanley and Mr.

Blake, would want particularly to select different jurors than would I.

I mean, I can understand that being as the record looks, is hat [sic] it may not be to my personal advantage to the side that I'm pursuing to have more jurors available by selection through Mr. Blake because his interest, Mr. Blake's interest, that is, Mr. Stanley's interest, is different that the interest that I pursue.

MR. BLAKE: I'm sorry, go ahead counsel.

MR. PETERSEN: In common sense, there are definitely two sides, and I know that the language does not have the "therefore" in it, but it would seem that over an abundance of caution, it might take little away from the time that would put in this trial, and it may give much because if Mr. Blake is not allowed these extra challenges, and if he made a record, say we used all ten of the peremptory challenges, and if he made record, say we used all then of the peremptory challenges on the defense table which includes, by change, Mr. Blake sitting here with me, and Mr. Blake said, "I wish to pursue and use others", then it would not be a mute point, and I'm not sure that we'd take a lot of extra time.

In an abundance of caution, it might be worthwhile allowing them the opportunity, if it should ripen, to have these extra challenges.

THE COURT: I'll hear from Mr. Crone.

MR. CRONE: I know of nothing that authorizes such

procedure, and I see no necessity. There is one defendant. (emphasis added)

MR. BLAKE: Your Honor, as I see it, we're in the kind of nebulous area here. In my research I've not found a case -- appellate case reported that's similar to the proceedings we have here now.

Mr. Petersen is correct that during the course of the jury selection it may well become a conflict between the jurors he feels secure with the jurors Mr. Stanley himself feels secure with.

It was in that spirit that I requested yesterday the inclusion of a third side.

Conceptually, a 1368 proceeding, as I understand the law, is some what a removal of the defendant from the proceedings and allowing the case to proceed through his attorney allowing the case to proceed through his attorney, acting in his own best interest, and the District Attorney.

It's with that conceptual unclearness that I don't -- I know of no statutory or case authority that says that the defendant is entitled to a third side.

However, I would agree with Mr. Petersen's comments that keeping in mind that nature of this case, out of an abundance of caution, Mr. Stanley should be allowed to exercise such challenges, personally, as he may wish.

(117 RT 22926-22929.)

The trial proceeded with two lawyers on the same side simultaneously advocating conflicting positions for the same client. But as the excerpt below demonstrates the Court persisted in refusing to recognize the pernicious anomaly it had created:

THE COURT: You may or may not be ready to respond to this question, Mr. Petersen or Mr. Blake, but during the course of the proceedings next week and oral testimony, do each of you, Mr. Petersen and Mr. Blake, wish to interrogate a witness?

MR. BLAKE: Well, Mr. Petersen, of course, when he calls his witnesses will be interrogating those witnesses such that he may call. I think it's going to depend, keeping in mind that I represent Mr. Stanley's personal interests, which are separate and distinct from his counsel.

I think it's going to depend on individual witnesses whether or not I will wish to inquire of them. It's not a situation where Mr. Petersen and I can agree that because of the different nature of the interest involved that we can take turns.

For example, cross examining the witnesses not called by either of us. We either have to independently make that judgment.

THE COURT: With that in mind, if that's the way that it works out, I'm not making any rulings at the moment. I just want to focus on it.

Mr. Petersen puts a witness on the stand, would your examination be further direct examination or

cross examination, Mr. Blake?

MR. BLAKE: It would have be deemed cross-examination, Your Honor.

THE COURT: I'm going to ask, and Mr. Crone, what would your position be on that?

All right. well, rather than asking anybody to make an off-the-cuff, you see the point I'm raising.

I'll ask all three counsel to present authority for Monday morning as to whether examination by Mr. Blake, witnesses put on by Mr. Crone, would be cross examination or direct.

And the witnesses placed on the stand by Mr. Blake would be under cross examination or direct by Mr. Petersen.

I think all of your [sic] understand what the Court is getting at...

...MR. CRONE: As long as we're talking about alignment for purposes of direct examination, cross examination, I'd like to talk about alignment (sic) on such matters as opening statement, closing arguments.

THE COURT: All right. Let's do that.

Mr. CRONE: The same problems arise...

MR. PETERSEN: ...I feel that my position, if the Court had an opportunity to review the in camera, it

would be obvious that my position is different than Mr Stanley's position.

And Mr. Blake does represent Mr. Stanley. Mr. Stanley repeatedly did not want to be found 1368. And Mr. Blake was appointed because of that.

And I feel that my position is one where I would not agree with Mr. Blake and Mr. Stanley on anything that would reflect -- if they wanted Mr. Stanley to not be found 1368. And I want him to be found 1368, then I would fee [sic] that they are opposed to me.

I would feel that I would have the obligation to give the first opening statement. And Mr. Blake would have an opportunity at some point in relation to Mr. Crone to give an opening statement.

MR. BLAKE: We're in kind of a -- maybe this is going to be a case of first impression. I don't know. I've never seen a case before like this.

THE COURT: I'm going to describe this as a shifting allegiences. (sic)

...THE COURT: I've seen that in all kinds of proceedings. There are some things where Mr. Petersen and Mr. Blake will be together as opposed to Mr. Crone. There will be some where Mr Blake and Mr. Crone will being the same position. And Mr. Petersen completely the opposite.

There are some where Mr. Petersen and Mr. Crone will be on one side and Mr. Blake the other. I think

we better have one order of procedure.

Would it be acceptable if we understand that the order of procedure, all the way through from the beginning on opening statement would be Mr. Petersen first, Mr. Blake second, and Mr. Crone third, and continue in that order.

MR. BLAKE: I suppose that's going to put Mr. Crone and I in a competition of seeing who can do the best job of proving Mr. Stanley competent.

MR. PETERSEN: Why don't you two sit together then?

MR. BLAKE: I think thats fine, Judge.

(119 RT 23579-23583.)

A myriad of other examples also depict the confusion brought by this ill-conceived scheme of representation (See e.g., 117 RT 22985; 117 RT 22959-60; 116 TR 22898; 116 RT 22848, 115 RT 22698.)

E. The Conflict Prejudiced Appellant's Representation

Due process standards do not mandate a proof of actual conflict to show a sixth amendment violation. California courts have held - regardless of whether there was an objection - that even a potential conflict may require several if the records supports "an informed speculation" that appellant's right to effective representation was prejudicially

affected. People v. Mroczko (1983) 35 Cal.3d at 105.

Federal law requires that in order to establish a violation of the 6th Amendment, defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affect his lawyer's performance. Cuyler v. Sullivan (1980) 446 U.S. 335, 348 fn. omitted. The court in Cuyler, supra, makes clear that "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. (Id. at pp. 344-350).

This case violates both standards. Although unusual in its form, it has all the elements of perniciousness recognized in conflict cases. Appellant's advocacy was weakened from "within". (See, e.g., United States v. Armedo-Sarmiento (2d Cir. 1975) 524 F.2d 591, 592-593 ["a defense counsel's conflict of interests may impair his effectiveness in assisting his client, or in confronting witnesses on behalf of client"]; Yorn v. Superior Court, supra, 90 Cal.App.3d at p. 699.) Attorney Blake cross examined all of attorney Petersen's witnesses. E.g. Blake cross-examined Dr. Axelrad extensively, questioning particularly about the competency instrument Axelrad had administered to the appellant. (217 RT 25022-25027.) Prosecutor Crone later picked up this same theme of examination and spent much of half his cross examination on it. (128 RT 25102-25134.) Thus Blake weakened the Appellant's case and bolstered the prosecution. In effect, Appellant's associate

counsel became a quasi-prosecutor.

This record supports, "'an informed speculation' that appellant's rights to effective representation was prejudicially affected." People v. Mroczko, supra, 35 Cal.3d at p. 105.) When a result is validly attached on the ground that the advocacy was influenced by conflict of interest, ..." the appellant court may not indulge in nice calculations as to the amount of [resulting] prejudice...'" (Maxwell v. Superior Court (1982), 30 Cal.3d 606, 612 quoting People v. Chaun (1968) 69 Cal.2d 765, 776-777 and fn. 3.)

F. The Trial Court Filed To Advise Appellant Of The Nature And Consequence Of The Conflict

"[T]rial judges assume the burden of ensuring that their appointments of counsel for indigent defendant do not 'result in a denial of effective counsel because of some possible conflict...'" (Maxwell v. Superior Court, (1982) 30 Cal.3d 606, 612.) [Richardson, T. dissenting] The trial court not only failed to warn appellant of the conflict here, but the court also exacerbated the conflict.

Appellant Stanley's acceptance of attorney Blake's appointment does not constitute an effective waiver of his right to conflict free representation. "While the right to conflict free counsel may generally be waived (Ct. omitted), waiver of constitutional rights must, of course, be "knowing, intelligent sets done with sufficient awareness of the relevant circumstances and likely consequences." (Brady v. U.S. (1970) 397 U.S.

742, 748 fn. omitted.)

As this court stated succinctly:

"We indulge every reasonable presumption against the waiver of unimpaired assistance of counsel." (Glasser, supra, 315 U.S. at p. 70, 62 S.Ct. at p. 464. People v. Mroczko, supra, 35 Cal.3d (1983) 86, 110.

Here there was no waiver examination by the trial court. Appellants response of "yes" that he would accept both attorneys Blake and Petersen representing him cannot possibly be construed as an effective waiver. There is no indication that anyone even understood the conflict, much less explained them to appellant.

G. THE COURT ABUSED ITS DISCRETION

Generally, Penal Code Section 1367 is invoked by the defendant and counsel for the protection of the defendant (In Re Blye, supra, [166 Ca.A.3d 569].) The statutory scheme provides for situations like the present one, where a defendant opposes the motion. Penal Code §1369 provides in relevant part:

"(a) The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two

psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrist or licensed psychologists may be named by the defense and one may be named by the prosecution."

The trial judge in this case appointed two psychiatrists pursuant to Penal Code Section 1369. Had he stopped there Appellant's interest would have been fully represented and his rights fully protected.

Judicial discretion is "broad and elastic" (People v. Russell (1968) 69 Cal.2d 187, 194); it is "that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule." (Harris v. Superior court (1977) 19 Cal.3d 786, 796). Nevertheless, this discretion must be "guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede the ends of substantial justice." (People v. Warner (1978) 20 Cal.3d 678, 683.) "[D]iscretion is abused whenever the court exceeds the bounds of reasons, all of the circumstances being considered." (People v. Giminez (1975) 14 Cal.3d 68, 72.) In short, the exercise of judicial discretion requires a reasoned balancing of the appropriate factors to reach a decision which furthers the ends of justice. (See People v. Rist (1976) 16 Cal.3d 211, 218-217.)

When all the circumstances here are considered, it is inescapable that the trial court failed in its "primary duty...to do justice" (People v. Carlucci

(1979) 23 Cal.3d 249, 256; see also Gitelson & Gitelson, A Trial Judge's Credo Must Include His Affirmative Duty To Be An Instrumentality of Justice, 7 Santa Clara L.Rev. 7 (1966) and accordingly, abused its discretion.

The appointment of Mr. Blake to represent Appellant's view that he was competent, and the inclusion of Blake within the defense scheme by the court, created massive confusion and conflict.

In capital cases, the state has a strong interest in reducing the risk of mistake judgment (People v. Chadd (1981) 28 Cal.3d 739.

The error requires reversal of the judgment of death here. The trial court has no power to proceed with the trial once a doubt arises as the sanity of the defendant. (Penal Code §1368; People v. Pennington (1967) 66 Cal.2d 508.) A competency hearing, with all the elements of due process must first be held. (People v. Westbrook, supra, 62 Cal.2d 197.) Here, the doubt was stated and a hearing was held, but at the hearing Appellant's due process rights were violated. Because Appellant was denied effective assistance of counsel at the competency hearing, the effect was the same as if Appellant had been denied his constitutional right to a hearing. (See Pate v. Robinson, supra, 383 U.S. 375. This error is prejudicial per se and requires reversal. (People v. Pennington, supra, 66 Cal.2d 508. The error cannot be cured by a retrospective determination of defendant's mental competence during the trial. (Pate v. Robinson, supra, 383 U.S. 375, 387.)

SUPREME COURT OF THE STATE OF CALIFORNIA,

FIILED january 28, 1994
NO S004605

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff And Respondent

vs.

GERALD FRANK STANLEY,
Defendant and Appellant

PORTIONS OF APPELLANT'S 1994 SUPPLEMENTAL OPENING BRIEF RE: COMPETENCY PHASE TRIAL

B.
ARGUMENT

I.

THE COURT-CREATED CONFLICT BETWEEN APPELLANT'S COMPETENCY COUNSEL COMPELS REVERSAL OF THE COMPETENCY PHASE VERDICT

A. Appellant's Contention

Appellant has previously submitted arguments to

this Court that the Court-created conflict between the various counsel appointed to represent Appellant at the competency phase trial constituted an abuse of discretion that mandates reversal of the judgment. (See, 2 AOB at pp. 25-52; ARB at p. 55-63.)

Appellant now supplements a portion of those original arguments.

B. Appointment of Attorney Blake As Co-Counsel Created An Impermissible Conflict of Interest

On August 26, 1983, the trial judge, after a lengthy in camera hearing involving a psychiatrist treating Appellant, suspended the ongoing penalty trial and ordered a competency trial. "In view of what has developed, the Court at this time is now making the following order suspending proceedings." (114 RT 22493, 22494.)

The Court then suspended the proceedings pursuant to Penal Code section 1368(b). See the Court's formal Order at 17 CT 4459-4460.

The Court appointed medical professionals to examine Appellant. (115 RT 22528) Later, Appellant rejected these doctors because Appellant believed they "are part of the system that's trying to put him to death." (115 RT 22549.)

Thereafter, after replacing the suspect doctors, the Court sua sponte brought up the offer of appointment of additional counsel for Appellant.

Appellant rejected the offer.

THE COURT: All right. Now it would appear that it would be appropriate at this time that there be an appointment pursuant to those sections of -- it would appear to the Court -- let me ask, first of all: Is this a matter which is generally concurred in by the Defendant and his Counsel, or is there dispute?

And the only reason I ask that is whether it's appropriate that the matter continue with you, Counsel, representing the Defendant.

* * *

If that is not the case, then it may appropriate that another counsel be appointed for the Defendant in connection just with these proceedings.

MR. NEILL:
May I have just a moment, Your Honor?

THE COURT:
Certainly.

MR. NEILL:
At this time, Your Honor, we are in accord.

* * *

THE COURT:
All right, Mr. Stanley, you've heard all the conversation we've had up to now, have you not?

MR. STANLEY:
Yes, sir.

THE COURT: You heard the Court's suggestion; you heard your counsel's responses to that suggestion. Now, do you wish to proceed at this time with two counsel you currently have, or would you like to have the Court appoint one of the public defenders officers in Butte County -- and, also, the appointment would be limited to such proceedings, or incident to the Penal Code section 1368 proceedings which are currently now.

MR. STANLEY: I wish to proceed with the counsel I have now.

THE COURT: You don't wish the added counsel; is that right?

MR. STANLEY: No, sir.

(114 RT 22543-22544; 22545, 22546.)

Later in the proceedings, the court, at the invitation of the Respondent, **again** approached **directly with Appellant** the idea of appointment of additional counsel for Appellant, for the purpose arguing Appellant's competency. This second time, the Appellant agreed:

THE COURT: Mr. Stanley, it does appear that there is a dispute at this point between you and your counsel as to proceeding under 1368. Do you wish the Court to appoint a counsel to represent you either in conjunction with these gentlemen or

without these gentlemen in connection with this proceeding?

MR. STANLEY: Yes.

THE COURT: All right. the -- now, which way --

MR. STANLEY: With.

THE COURT: With them?

MR. STANLEY: Yes.

THE COURT: Do you want to keep them, and you want other counsel as well?

MR. STANLEY: Yes.

(115 RT 22555-22559.)

On August 31, 1993, the presiding Judge appointed a third defense attorney, Donald Blake, as an associate defense counsel for Appellant. (115 RT 22559.)

Attorney Blake was appointed "as a result of the difference of opinion between (Appellant's) present counsel and Mr. Stanley (Appellant) regarding the (Penal Code) 1368, 1369 proceeding." 115 RT 22561.)

Attorney Blake's involvement in the competency phase proceedings were generally summarized by him in a presentation to the Court.

It's stated as of record, and stated to this jury that defendant does not want to be found incompetent, does believe that he is competent, and that's the whole reason I was appointed in this case, because of a conflict between his trial counsel and his own personal wishes.

(124 RT 24413.)

Attorney Blake, throughout the competency trial, argued, and strongly so, that Appellant was competent.

First, Blake conducted voir dire.

Second, the Court instructed the jury that Attorney Blake would put on evidence that he felt appropriate (121 RT 2323817.)

Third, Attorney Blake extensively cross-examined those witnesses presented by Appellant who testified as to Appellant's incompetency, i.e., Attorney Neill (125 RT 24637-24641; 127 RT 24881-24884), and Dr. Axelrad (128 RT 24980-24987; 128 RT 25040-25047; 25192-25205).

Fourth, Attorney Blake also called his own witnesses in the competency trial for the purpose of providing evidence of Appellant's competency, i.e., Randall Howard Smith (129 RT 25249-25255) and Bobby Martinez (129 RT 25258-25265).

Fifth, Blake asked questions of Respondent's experts for the purpose of establishing Appellant's competency, i.e., Attorney Blake presented

questions as to Dr. Whipple (129 RT 25356-25357) and Dr. French that allowed those witnesses to further speculate about Appellant's competency.

Sixth, Blake presented arguments to the jury on the competency question. (131 RT 25538-25543.)

Attorney Blake's conduct at the competency trial, conduct that was never fully waived by Appellant, severely prejudiced the performance of Appellant's counsel arguing incompetency at the competency phase proceeding.

In this case, Attorney Blake clearly prejudiced the argument that Appellant was incompetent, the only argument that was available to Appellant after the Penal Code section 1368(b) proceeding was commenced.

Appellant contends the obvious, the appointment of Attorney Blake to advocate Appellant's competency effectively created a prejudicial conflict of interest in Appellant's representation.

C. Attorney Blake's Trial Advocacy Was Contrary to All Law

Once the Court ordered competency proceedings as a result of Appellant's counsel raising the issue of Appellant's competency, Attorney Blake's trial efforts on behalf of Appellant to show that Appellant was competent, were contrary to all law.

"[A]fter there has been a prima facie showing of mental incompetence...defendant's attorney must

play a greater role in making fundamental choices for him, and cannot be expected to seek approval of those strategic decisions made in the course of obtaining and presenting proof of incompetence." (People v. Samuel (1981) 29 Cal.3d 489, 495; People v. Hill (1967) 67 Cal.2d 115, fn. 4.)

In Shepard v. Superior Court (1980) 180 Cal.Ap.3d 23, the issue before the court as "whether defense counsel who declares a doubt as to defendant's mental incompetency to stand trial and who intends, in pursuing the best interest of his client, to argue such incompetence as the Penal Code section 1368 hearing, may be relieved by the trial court because defendant desires his counsel to argue for competence and present only evidence to suggest that position. (Id., p. 25.)

After a careful review of the authorities, the Shepard court concluded that it was error to remove counsel who, over his client's objection, argued in favor of his client's incompetency. (Shepard v. Superior Court (1980) Cal.App.3d 23, 33-34.)

"The rational giving competent defendants ultimate authority over tactical decisions at trial, does not extend to this situation, where defendant' counsel's duty to protect a prima facie mentally incompetent defendant requires contravening that defendant's tactical preferences." (Id., p. 29.)

"When evidence indicates that defendant may be insane, it should be assumed that he is unable to act in his own best interest." (Id.) "In such circumstances, counsel must be free to act even

contrary to the express dictate of his own client." (Id.) Conducting the trial according to the dictates of a defendant who, evidence indicates, may be insane, can result in prejudicial error. (Id., pp. 29-30.)

In People v. Bolden (1979) 99 Cal.App.3d 375 the defendant appealed an "order finding him mentally incompetent to stand trial based upon a jury verdict of incompetence." (Id., p. 377.)

"Criminal proceedings were suspended to determine if (the defendant) was competent to stand trial." (Id.) The defendant "wanted to be found competent." (Id., p. 378.) The jury found the defendant "not competent to stand trial."

The defendant sought reversal contending "he was denied effective assistance of counsel..." Id., p. 379.) "By his attorney...offering evidence of incompetence, (the defendant) contend(ed) (that) his desire to be found competent went unrepresented." (Id.)

The Bolden court rejected the defendant's arguments. The Court found that when the defense lawyer has a doubt as to a defendant's competence, and competency proceedings are initiated, effective assistance of counsel requires the defendant's counsel to abandon at the competency trial, any position that defendant is competent.

Diligent advocacy does not require an attorney to blindly follow every desire of his client. An attorney can ordinarily make binding waivers of many of his

client's rights as to matters of trial tactics (People v. Hill, 67 Cal.2d 105, 114). When the attorney doubts the present sanity of his client, he may assume his client cannot act in his own best interest and may act even contrary to the express desires of his client (People v. Hill, supra, 67 Cal.2d 105, 115, fn.4). To do otherwise may cause prejudicial error. (People v. Merkouris (1956) 46 Cal.2d 540).

(The defendant's) attorney provided effective assistance to his client.

(People v. Bolden supra, 99 Cal.Ap.3d 375, 380.)

When Appellant's regular attorneys, i.e., Mr. Neill and Mr. Petersen, declared a doubt as to Appellant's competency to stand trial (and when the trial court concurred in that observation and set the matter for a competency trial), it was only Attorney Neill and Petersen who could argue Appellant's position.

The only position that could or should have been represented by all attorneys representing Appellant, including Attorney Blake, was that Appellant was incompetent.

The subsequent appointment of Attorney Blake to argue Appellant's competence, and Attorney Blake's advocacy of same was a conflict that constituted a two-fold deprivation of Appellant's right to conflict-free counsel.

First, the appointment of Attorney Blake, and his subsequent vigorous advocacy of Appellant'

competence, effectively operated as an involuntarily removal of Attorney Petersen and Attorney Neill as the sole advocates of Appellant's position. Attorney Blake's rial tactics diluted, hence effectively removed, complete representation of the position of Appellant's incompetency.

"The involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed." (People v. Daniels (1991) 52 Cal.3d 815, 846; Cannon v. Commission on Judicial Qualifications (1975) 14 Cal.3d 678, 697; Maxwell v. Superior Court (1982) 30 Cal.3d 606, 615; Smith v. Superior Court (1968) 68 Cal.2d 547, 561.)

Second, as soon as Attorneys Neill and Petersen, as well as the trial court, raised their doubts as to Appellant's competence to stand trial, those attorneys effectively represented Appellant's sole position at the competence trial. The appointment of Attorney Blake as co-counsel, had the prohibited effect of "injecting an undesired attorney into the proceedings ..." thereby constituting deprivation of right to conflict-free counsel. (People v. Courts (1985) 337 Cal.3d 784, 796.)

Attorney Blake argued a position at the competency trial that was adverse to the position of incompetency taken by Attorneys Neill and Petersen, the individuals who were charged with representation of Appellant's position of incompetency.

Attorney Blake advocated a position, i.e, Appellant's competency, that was contrary to all law, and resulted in a conflict in Appellant's representation.

D. Appellant Did Not waive The Court-Created Conflict

Appellant has previously argued that there was no waiver permitting Attorney Blake to effectively deprive Appellant of conflict-free counsel at the competence trial. (See, 2 AOB at pp. 48-49.)

A recent case from the Court has clarified the minimum procedures that the trial court should have followed before any argument of waiver can, in good faith, be undertaken.

In order to safeguard a criminal defendant's constitutional right to the assistance of conflict-free counsel, and thereby keep criminal proceedings untainted by conflicted representation, the United States Supreme Court has laid down certainly certain essentially prophylactic rules in this area. (People v. Bonin (1989) 47 Cal.3d 808, 836.)

"When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter." (Citations omitted.) (Id.) "It is immaterial how the court learns, or is put on notice, of possible conflict..." (Id.)

"The trial court is obligated not merely to inquire,

but also to act in response to what its inquiry discovers." (Citations omitted.) (Id.)

"After the trial court has fulfilled its obligation to inquire into the possibility of a conflict of interest...a defendant may choose the course he wishes to take." (Id., p. 837.) "The defendant may...decline or discharge conflicted counsel." (Id.) "But he may also choose not to do so..." (Id.)

"To be valid...waivers of constitutional rights must, of course, be knowing, intelligent acts done with sufficient awareness of the relevant circumstances an likely consequences... It must be unambiguous and without strings." (Id.)

"Before he accepts the waiver offered by defendant, the trial court need not undertake any particular form of inquiry...but, at a minimum...must assure itself that (1) the defendant has discussed the potential draw-backs of potentially conflicted representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of such representation in this case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive the right. (Citations omitted.) (Id.)

The record in this case is devoid of any meaningful colloquy between the Court and Appellant concerning the association of Attorney Blake, and what such association will mean to Appellant's overall trial position, including competency trial position. (See, e.g., 115 RT

22555-22559.)

THE COURT:
Mr. Stanley, it does appear that there is a dispute at this point between you and your counsel as to proceeding under 1368. Do you wish the Court to appoint a counsel to represent you either in conjunction with these gentlemen or without these gentlemen in connection with this proceeding?

MR. STANLEY:
Yes.

THE COURT:
All right. the -- now, which way --

MR. STANLEY:
With.

THE COURT:
With them?

MR. STANLEY:
Yes.

THE COURT:
Do you want to keep them, and you want other counsel as well?

MR. STANLEY:
Yes.

(115 RT 22555-22559.)

As such, there has been no effective waiver by

Appellant. (See, e.g., People v Gonin, supra, 47 Cal.3d 808, 838-839.) (See also, People v. Mroczko (1983) Cal.3d 86, 110.)

E. The Conflict Compels Reversal Of The Judgment

Under both the Sixth Amendment to the United States Constitution as applied to the states under the due process clause of the Fourteenth Amendment (citations omitted) and Article I, section 15 of the California Constitution (citations omitted), defendant in a criminal case has a right to the assistance of counsel. (People v. Bonin (1989) 47 Cal.3d 808, 833.)

"The constitutional guarantee entitles the defendant not to some bare assistance but rather to effective assistance." (Id., p. 833-834.)

"Included in the right to effective assistance at counsel is a correlated right to representation that is free from conflict of interest." (Id. p. 834, citing, among other places, Wood v. George (1981) 450 U.S. 261, 271; Leversen v. Superior Court (1983) 34 Cal.3d 530, 536-537; People v. Chacon (1968) 69 Cal.2d 765, 774.)

Appellant submits that when Attorney Blake was appointed to represent Appellant's opposition of competency, and when Attorney Blake thereafter vigorously argued to the competency jury of Appellant's competency, Appellant, under the facts of this case, was denied his right to conflict-free representation.

First, the right to representation that is free from conflicts of interest in "fundamental (Cuyler v. Sullivan, supra, 446 U.S. at p. 343...) and is among those constitutional rights to basic to a fair trial that their infraction can never be treated as harmless error." (Holloway v. Arkansas, supra, 435 U.S. at p. 489...quoting, Chapman v. California (1967) 386 U>S. 18, 23...accord, Cuyler v. Sullivan, supra, at pa. 349; Rose v. Clark (1986) 478 U.S. 570, 577-578..." (People v. Bonin, supra, 47 Cal.3d 808, 834-835.)

Conflict of interests broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by the attorney's responsibility to another client, or a third person, or by the attorney's own interest. (People v. Bonin (1989) 47 Cal.3d 808, 835.)

Reversal of the judgment is required.

Second, deprivation of Appellant's right to counsel of his choice requires reversal regardless of whether in fact he had a fair trial. (People v. Courts, supra, 37 Cal.3d 784, 796, citing, People v. Grikowski (1982) 32 Cal.3d 580, 589; Reynolds v. Cockran (1961) 365 U.S. 525, 531; People v. Byoune (1966) 65 Cal..2d 345, 346; People v. Crovedi (1966) 65 Cal.2d 199, 205; see, also, Rose v. Clark (1986) 478 U.S. 570, 577-578.)

Second, this Court could base reversal on the complete failure of the trial court to get a complete and satisfactory waiver from Appellant concerning association and subsequent advocacy of and by

Attorney Blake.

This Court in People v. Bonin, supra, 47 Cal.3d 808 ruled that to obtain reversal resulting from the trial court's failure to act in response to a conflicted representation, "defendant did not need to demonstrate specific outcome-determining prejudice." (Id., p. 837.) "But he must show that an actual conflict of interest existed and that conflict adversely affected counsel's performance." (Citations omitted.) (Id., p. 837, 838.)

Appellant can easily make the appropriate Bonin showing of adverse performance by counsel.

The trial court was wrong in ordering a non-waived conflict within Appellant's representation. (See, e.g., Remington, The Changing Role of the Trial Judge in Criminal Cases-Ensuing That the Sixth Right to Assistance of Counsel is Effective (1987) 20 U.S. Davis L.Rev. 339, 350.) The net result of that order, the appointment and advocacy of and by Attorney Blake, compels reversal of the judgment.

V.
THE COURT ERRONEOUSLY INSTRUCTED THE JURY REGARDING THE DEFINITION OF INCOMPETENCY

A. Appellant's Contention

At the close of evidence, and just before argument, the competency phase jury was instructed as to the definition of when Appellant would be considered mentally incompetent.

Appellant contends that said instruction, an instruction tracking the language of Penal Code section 1367, failed to properly instruct the jury s to the relevant law.

This error compels reversal.

B. The Jury Instruction Given At The Close Of Evidence Incorrectly Define Competency To Stand Trial

Appellant's competency was tried by a jury.

At the close of evidence, the jury was instructed by the Court as to the definition of competency:

Penal Code section 1367 provides that:

"A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this proceeding if, as a result of mental disorder or developmental disability defendant is unable to understand the nature of the criminal proceedings or to assist (sic) counsel in the conduct of a defense in a rational manner."

(131 RT 65537.)

This instruction was erroneous.

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosection of a defendant who is not competent to stand trial." (Medina v. California,

supra, 112 S.Ct. 2574.)

"The failure to observe procedures adequate to protect a defendant's right not to be tried while incompetent to stand trial deprives him of his due process rights to a fair trial." (Drope v. Missouri (1975) 420 U.S. 162, 172.)

The United States Supreme Court set out the legal test for competency in Dusky v. United States (1960) 362 U.S. 402:

It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.

"Because competency to stand trial is an aspect of substantive due process...(citations omitted)...the legal standard by which competency is to be evaluated is constitutionally mandated." (Lafferty v. Cook (10th Cir. 1992) 949 F.2d 1546, 1550.)

"Accordingly, the components of that standard, required as they are by the Constitution, do not vary according to the views of a particular court." (Id.)

"The Constitution can require but one gauge against which to determine whether, because of his mental condition, a defendant's due process rights are violated by requiring him to stand trial. (Id.)

The Dusky standard is followed in California by application of a three-part test:

"A defendant cannot be tried or adjudged to punishment unless (1) he is capable of understanding the nature and purpose of the proceedings against him, (2) he comprehends his own status and condition in reference to such proceedings, and (3) he is capable of assisting his attorney in conducting his defense or is capable of conducting his own defense in a rational manner."

(People v. Clark (1985) 168 Cal.App.3d 91, 94; see also, People v. Amador (1988) 200 Cal.App.3d 1449, 1453; People v. Conrad (1982) 132 Cal.App.3d 361, 369; People v. Campbell (1976) 63 Cal.App.3d 599, 608; People v. Crosier (1974) 41 Cal.App.3d 712, 716.)

Appellant submits that the definition of competency given to the jury at the close of evidence, an instruction that closely tracks the wording of Penal Code section 1367, fails to satisfy the competency definition mandated by Dusky v. United States, supra, 362 U.S. 402.

A few examples of the deficiencies are useful:

First, there is nothing in the instruction that required Appellant to be able to understand the nature and purpose of the criminal proceedings against him.

All the instruction states is that Appellant be "unable to understand the nature of the criminal

proceeding." (131 RT 25537.)

Second, the instruction was completely silent on the requirement that Appellant "comprehends his own status and condition in reference to such proceeding" as required by Dusky. (See, e.g., People v. Clark, supra, 168 Cal.App.3d 91, 94.)

Third, the instruction given was deficient in its inclusion of the word **rational** in conjunction with the word **manner**, i.e., **rational manner**.

The appropriate Dusky standard requires "a present ability to consult with his lawyers with a reasonable degree of **rational** understanding - and whether he has a **rational**, as well as factual understanding of the proceedings against him." (Emphasis added.) (Dusky v. United States, supra, 362 U.S. 402.

The problem with the Penal Code section 1367 instruction is that the phrase therein "rational manner" is ambiguous and fails to provide the full two-fold rational test set out in Dusky, i.e., "sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding - and whether he has a rational, as well as factual understanding of the proceeding against him."

"Describing the degree of understanding that a defendant must have, the court in Dusky said that it is not enough that the defendant be oriented in time and place." (Silten & Tullis, Mental Competency I Criminal Proceedings (1977) 28 Hastings Law Journal 1053, 1060.) "Rather, the defendant must

have a rational as well as factual understanding of the proceedings against him." (Id.) See also, Haddox, et al. Mental Competency to Stand Trial While Under the Influence of Drugs (1974) Loyola Law Review, pp. 428-437 (careful review of the Dusky case, including transcript from trial court proceedings, revels that Supreme Court holding mandates a three-part competency analysis).)

The complete and full Dusky definition of competence to stand trial was missing from the relevant jury instruction in this case. These critical omissions constitute a deprivation to Appellant of the due process of law. (See, Lafferty v. Cook, supra, 949 F.2d 1546, 1550.)

C. The Erroneous Competency Phase Jury Instruction Requires Reversal of Competency Phase Verdict And Penalty Phase Verdict

1. Federal Constitutional Error - Per Se Error

Any error in giving a jury instruction, when the error is of federal constitutional dimension and amounts to a structural defect is reversible per se. (Sullivan v. Louisiana (1993) 508 U.S. ___, 124 L.Ed.2d 182, 199.)

The trial judge suspended the penalty proceedings in this case pursuant to Penal Code section 1368, and referred the matter to the presiding judge for a Penal Code section 1368 competency proceeding. (17 CT 4459-4460.)

Once that doubt was raised regarding

Appellant's competency to stand trial, "the matter is jurisdictional and cannot be waived by defendant or his counsel." (In re Davis (1973) 8 Cal.3d 798, 808, citing, People v. Pennington (1965) 66 Cal.2d 508, 521; People v. Aparicio (1952) 38 Cal.2d 565, 568.)

Appellant submits that the defective jury instruction defining competency to stand trial given in this case creates a structural defect that mandates per se reversal.

2. Federal Constitutional Error-Harmful Error

There are instance when deprivation of a constitutional right during trial does not render the trial verdict per se reversible.

"In those instances, the verdict is not disturbed if the constitutional error was "harmless" (Chapman v. California (1967) 368 U.S. 18."

Rose v. Clark (1986) 478 U.S. 570, 579-580 is a case when the question of th impact of an instructional error was resolved using the Chapman harmless error test.

Appellant submits that even under Chapman, the erroneous instruction in this case could not be considered harmless error.

In Chapman, the Supreme Court found that area is harmless if, beyond a reasonable doubt, it "did not contribute to the verdict obtained." (Chapman v. California, supra, 386 U.S. 18, 24.) "To say that an

error did not contribute to the verdict...is to find that error unimportant in relation to everything else the jury considered on the issue in question..." (Yates v. Evatt (1991) 500 U.S. ___, ___, 114 L.Ed.2d 432, 448-449.

The Chapman harmless error test is clearly not satisfied in this case.

First, Respondent puts heavy emphasis on the Penal code section 1367 definition of incompetency during Respondent's closing argument:

"So when you look at the standard -- I mean -- of the law, that was given that a person cannot be tried or adjudged to punishment while such person is mentally incompetent, a defendant is mentally incompetent, for the purpose of this proceeding, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the civil proceedings or to assist in the conduct of a defense in a rational manner."

(131 RT 25574.)

Indeed, the prosection positioned its entire closing argument on the Penal Code section 1367 definition, a definition that clearly does not present the full Dusky standard.

Second, the instruction itself is clearly wrong.

Third, the ambiguities in the instruction caused the jury to be confused.

After the jury retired to deliberate, the judge announced that, "We had an inquiry from the jury." (132 RT 25637.) "The jury wants the definition of **rationally assist** and I think a copy of the note was given to all counsel." (Id.) (Emphasis added.) Indeed, the jury sent a note to the judge stating, "The jury wants a definition of rationally assist." (17 CT 4581.) It is clear that the instruction, as might be suspected, caused the jury substantial confusion. (See, 132 RT 25637-25647.)

Fourth, it is clear, in this case, that review of the instructions as a whole is not appropriate. This Court should focus exclusively on the definition under Penal Code section 1367.

In this regard, the Court is respectfully directed to review the verdict form used for the Penal Code section 1368.

Regardless of what other instructions were given, the question posed to the jury was whether Appellant was competent "within the meaning of Penal Code section 1367 and 1368." (17 CT 4604.) The interrogatory posed to the jury compelled it to base its verdict in the competency proceedings solely on the issue of whether Appellant was competent within the flawed definition of Penal Code section 1367. Regardless of what instructions were given, the verdict form, the controlling interrogatory to the jury, compelled them to rule in this case based on competency as defined pursuant to Penal Code section 1367.

Respondent simply cannot be heard to assert

that other instructions repaired the defect. Based on the verdict form the only instructions that were relevant to the jury's determination of Appellant's competency was that instruction which defined Penal Code section 1367.

Appellant concedes, as he must, that the competency jury was given preliminary instructions that gave a more complete definition as to the meaning of competency, that the definition given at the close of evidence. (See, 121 RT 23821.) The preliminary instruction must, based on the unique facts of this case, be disregarded by this Court in determining whether the Penal Code section 1367 instruction given at the close of evidence falls below the minimum standard set out in Dusky v. United States, supra, 362 U.S. 402.

As discussed, the jury verdict specifically directed the jury's attention to the Penal Code section 1367 instruction given by the Court. (17 CT 4604-4608.) For this Court to focus on the preliminary instruction, in making a harmless error determination concerning the concluding instruction, would result in this Court doing something that Appellant's competency jury was, pursuant to the verdict form, specifically directed not to do.

Indeed, the trial court, when it gave the concluding instructions including the faulty Penal Code section 1367 instruction, informed the jury that, "It is my duty in these instructions to explain to you the law that applies in this case." (131 RT 25532.) "You must accept and follow the law as I state it to you." (Id.)

Moreover, the preliminary instructions conflict with the concluding instruction reference to a code section, i.e., Penal Code section 1367, was incorporated in the verdict form. As such, no weight can be given to the instruction initially given. (See, Lemons v. Regents of University of California (1978) 21 Cal.3d 869, 878; Krouse v. Graham (1977) 19 Cal.3d 59, 73; People v. Deloney (1953) 41 Cal.2d 832; People v. Cornett (1948) 33 Cal.3d 33, 41; People v. Dail (1943) 22 Cal.2d 642.

Fifth, the issue of competency was hotly contested during trial. In this regard, Appellant has an expert, and those attorneys who represented Appellant's actual interests, i.e., Attorney Petersen and Attorney Neill, never conceded that Appellant was competent. This position was supported by the elaborate testimony of Dr. Axelrad.

At a minimum, since the definition of competency is a Federal Constitution dimension, the judgment must be reversed unless the state can demonstrate beyond a reasonable doubt that the error did not affect the verdict. (See, Rose v. Clark, supra, 478 U.S. at 576-582.)

Based on the above, the Respondent is unable to satisfy the harmless error analysis. Accordingly, should the Court elect to apply the harmless error standard, it is clear that, under the appropriate test, the error can not be classified as harmless.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF BUTTE

FILED NOVEMBER 17, 1983
NO. 79825

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

GERALD FRANK STANLEY,
Defendant
SUPERIOR COURT OF CALIFORNIA
COUNTY OF BUTTE

JUDGMENT OF THE VERDICT
OF THE JURY 1368 PROCEEDINGS

This case came on regularly for trial on 1368 PC proceedings on October 17, 1983 and continued through the 17th day of November, 1983 in the above-entitled Court, the Honorable Reginald M. Watt, Judge presiding; the People appearing by District Attorney Robert L. Crone, Lake County, and the defendant appearing by attorneys Robert Blake and William Neill and Richard Petersen.

A jury of twelve persons and two alternates were impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the case was submitted to the jury with directions to return a verdict on the 1368

proceedings. The jury deliberated and thereafter returned into court with its verdict, which said verdict was in the words as follows, to-wit:

"SUPERIOR COURT OF CALIFORNIA,
COUNTY OF BUTTE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff, No. 79825
vs. VERDICT
1368 PROCEEDINGS
GERALD FRANK STANLEY,

Defendant./

We, the jury in the above-entitled matter, find the defendant GERALD FRANK STANLEY, to be Competent within the meaning of Penal Code Section 1367 and 1368.

Dated: 11/17/83 /s/ Edith L. Kellman
Foreman

The jury having found the defendant competent within the meaning of Penal Code Section 1367 and 1368, trial on the penalty phase of this case will be resumed.

Dated: November 17, 1983
Judgment entered this 17th day of November, 1983.

/s/
Reginald M. Watt

Judge of the Superior Court

Clerk's Office of the Superior Court of the State of California, County of Butte.

I, the undersigned clerk of said Court, do hereby certify the foregoing to be a full, true and correct copy of the judgment entered in the above-entitled action and of the whole thereof.

ATTEST my hand and seal of said Superior Court this 17th day of November, 1983.

ELEANOR M. BECKER, COUNTY CLERK AND ex-officio Clerk of the Superior Court of the State of California in and for the County of Butte.

By /s/
Deputy

[SEAL]

Recorded (date), 1983
JUDGEMENT BOOK (no.), Page (page)

By /s/
Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF BUTTE

NO. 79825

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

GERALD FRANK STANLEY,
Defendant
SUPERIOR COURT OF CALIFORNIA
COUNTY OF BUTTE

NOVEMBER 16, 1983 REPORTER'S TRANSCRIPT

(WHEREUPON COURT CONVENED AT 11:15 A.M. AS FOLLOWS:)

THE COURT: The record may show that we're convened in the absence of the jury. We had an inquiry from the jury. The jury wants the definition of "rationally assist" and I think a copy of that note was given to all counsel.

MR. BLAKE: That's correct.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF BUTTE

NO. 79825

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

GERALD FRANK STANLEY,
Defendant
SUPERIOR COURT OF CALIFORNIA
COUNTY OF BUTTE

NOTE FROM THE DELIBERATING JURY
ON NOVEMBER 16, 1983

/The jury wants a definition of Rationally assist./

/Edith Kellman/

[SEAL]